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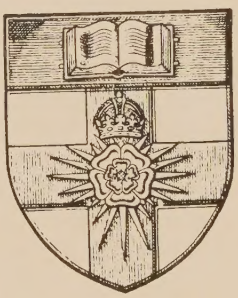

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1906.

Dec. 21. Sir Henry Burton Buckley, *Lord Justice of Appeal, and* Sir Arthur Kekewich, *one of the Justices of the High Court of Justice, were sworn of the Privy Council.*

1907.

Jan. 23. The Right Honourable Lord Field, *of Bakeham, Surrey, formerly one of the Justices of the High Court of Justice, died at his residence at Bognor, at the age of* 93.

Feb. 20. The Right Honourable Lord Davey, *of Fernhurst, Sussex, Lord of Appeal in Ordinary, died at his residence in London in the* 74*th year of his age.*

March 6. The Right Honourable Sir Richard Henn Collins, *Master of the Rolls, was appointed a Lord of Appeal in the place of* Lord Davey, *and was created a Baron for life by the style and title of* Baron Collins *of Kensington in the county of London.*

March 6. The Right Honourable Sir Herbert Hardy Cozens-Hardy, *a Lord Justice of Appeal, was appointed Master of the Rolls in the place of* Sir Richard Henn Collins. The Honourable Sir William Rann Kennedy, *one of the Justices of the High Court of Justice, was appointed a Lord Justice of Appeal.* William Pickford, Esq., K.C., *was appointed one of the Justices of the High Court of Justice, and was afterwards knighted.*

Oct. 6. The Right Honourable Lord Brampton *of Brampton in the United Kingdom, formerly one of the Justices of the King's Bench Division, died at his residence in London at the age of* 90.

Oct. 12. Bernard John Seymour, Lord Coleridge, K.C., *was appointed an additional Justice of the King's Bench Division of the High Court of Justice in pursuance of s.* 18 *of The Appellate Jurisdiction Act,* 1876.

Nov. 22. The Right Honourable Sir Arthur Kekewich, *one of the Justices of the High Court of Justice, died at his residence in London at the age of* 75.

Dec. 11. Harry Trelawney Eve, Esq., K.C., *was appointed one of the Justices of the High Court of Justice. He was afterwards knighted.*

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

JOLLY . . . . . APPELLANT;

AND

KINE . . . . . RESPONDENT.

H. L. (E.)
1906
Oct. 25.

Light—Obstruction—Ancient Lights—Nuisance.

The appellant built a house near the respondent's house in a London suburb and thereby obstructed its ancient lights. In an action by the respondent against the appellant Kekewich J. found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room in question was "still a well-lighted room":—

Held, by Lord Loreburn L.C. and Lord James of Hereford (Lords Robertson and Atkinson dissenting), that there was evidence to justify the finding as to a nuisance, and that there was nothing in the decision inconsistent with the principle laid down in *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.

The decision of the Court of Appeal, [1905] 1 Ch. 480, affirmed.

THE respondent having brought an action against the appellant for obstructing the respondent's ancient lights, the case was twice tried before Kekewich J. The first trial has no bearing upon the present appeal. On the second trial Kekewich J. found

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as a fact that the obstruction amounted to a nuisance, and ordered the appellant to pull down the obstruction. The Court of Appeal (Vaughan Williams and Cozens-Hardy L.JJ., Romer L.J. dissenting) varied that decision by reversing the order to pull down, and directed an inquiry as to damages. Hence the present appeal.

May 3, 4. *Hughes, K.C.*, and *W. E. Vernon*, for the appellant, laid great stress on the observation of Kekewich J. in his judgment that the room in question was still a well-lighted room, and contended that the finding of fact as to a nuisance was contrary to the evidence, and that the decision of Kekewich J. was inconsistent with the principle of *Colls* v. *Home and Colonial Stores*. (1)

P. O. Lawrence, K.C., and *W. M. Cann*, for the respondent.

Hughes, K.C., in reply.

The House took time for consideration.

Oct. 25. LORD LOREBURN L.C. My Lords, this appeal relates to an alleged interference with lights. The law on this subject has been laid down in this House in the case of *Colls* v. *Home and Colonial Stores, Ld.* (1), and I understand it to be as follows. The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Co.* v. *East India Co.* (2), that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded.

In applying the doctrine of this case to the present litigation I have felt much difficulty. Kekewich J. adopted, as it appears to me, a perfectly sound view of the law, and in dealing with the facts he found that what would amount to a nuisance

(1) [1904] A. C. 179. (2) (1752) 1 Dick. 163.

was proved. But he said that the room of which the main complaint had been made was "still a well-lighted room." This statement might seem inconsistent with the finding. I think he must have meant that it was well lighted, not according to the standard to be expected in the actual locality and surroundings, but according to the standard of a crowded city. I find that distinction drawn in Mr. Pratt's evidence, and I think the learned judge had that passage in his mind when he spoke of a well-lighted room. Kekewich J. evidently accepted the evidence of Mrs. Reid and Mr. Virgoe, which established a nuisance. I attach the greatest importance to the opinion on such a matter of the learned judge, who had the advantage of observing the witnesses, and as that opinion has been supported by two out of three members of the Court of Appeal, I cannot think it would be safe for your Lordships to reverse this judgment on a pure question of fact.

I desire to add my profound regret that in a matter comparatively small such enormous costs have been incurred.

LORD JAMES OF HEREFORD. My Lords, I concur in the judgment delivered by the Lord Chancellor. The questions raised in the case had, in the first instance, to be determined by Kekewich J. He had to resolve questions of fact after hearing evidence, and then to direct himself as to the law controlling the facts he found. I think that Kekewich J.'s judgment should be taken to be represented by its substance more than by detailed expressions. I take it that the learned judge intended to accept the decision of your Lordships' House in *Colls* v. *Home and Colonial Stores*. (1) He commences his judgment by saying: "This has to be considered on the lines of the recent decision in the House of Lords"; and he then proceeds, I think, to apply the principle established by *Colls' Case* (1) to the one before him, and he finds that the obstruction caused to the plaintiff's light amounts to a nuisance. It is true that Kekewich J. uses some words that have been much discussed in argument. He said: "I am convinced that the character of the room is altered, and that, though still a well-

(1) [1904] A. C. 179.

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lighted room, it has lost in the obstruction of light one of its chief charms and advantages." It was urged that the words "still a well-lighted room" brought the alleged cause of action within the judgment in *Colls' Case* (1), and so deprived the plaintiff of any right to recover compensation. But the words are relative in their character, and I do not think that the learned judge, by employing them, intended to bring the case within your Lordships' previous decision, still less to set that decision at defiance.

Cozens-Hardy L.J. so reads Kekewich J.'s words, for he says: "In the present case I think it is clear that the learned judge held that the letting and selling value of the house has been affected by the defendants' building, and he has also certainly found that the comfort and convenience of the occupier have been affected by it. That being so, there is nothing, I think, in the decision in *Colls' Case* (1) which in any way prevents me from arriving at the conclusion which I propose to adopt. . . . . Is it any answer to say that the room is still a well-lighted room? I think not if the building makes the room less fit for occupation, and I do not think that we can bring in the phrase, 'according to the ordinary notions of mankind,' to cut down the effect which would otherwise result from a building of this nature. I for my part accept the findings of fact of Kekewich J. He has found, as I read his judgment, that the letting and selling value has diminished, and that the plaintiff's morning-room is materially affected so far as the comfort and convenience of the occupiers are concerned."

Vaughan Williams L.J. seems to concur in this construction put on Kekewich J.'s words. For my own part I so read them, and, having carefully gone through the evidence, I think the finding of the learned judge as construed by Cozens-Hardy L.J. was correct. I submit to your Lordships that this appeal should be dismissed.

LORD ROBERTSON. My Lords, I find it impossible to reconcile the judgment under review with the law laid down by this House in the case of *Colls*. (1)

(1) [1904] A. C. 179.

The facts are of the simplest; and the photographs present the relative positions of the two houses with complete perspicuity. The only room in the house on which the respondent founded is pronounced by the learned judge who tried the case to be in its present condition "a well-lighted room."

The real truth of the case is that the respondent had the singular good fortune to enjoy for a very long time an uninterrupted view and an amount of light correspondingly exceptional for a suburban villa. The inmates of her house, quite naturally, feel keenly the effect of a detached villa being built beside them, and compare their existing light, not with the ordinary light of such houses, but with their own former and favoured condition.

Accordingly what the trial judge founds on is the diminution of the "charm," "advantage," and "cheerfulness" of this room, and the resulting change in its "character." Now, if it were the law that in twenty years a proprietor loses the right to build on his own ground in any way which diminishes the charm, advantage and cheerfulness of a room in his neighbour's house, the appellant must submit to this curtailment of his rights. But the case of *Colls* (1) is entirely negative of the view that the effect of twenty years is to prescribe a right to continue to enjoy in all time the measure of light tantum et tale as it existed during the period of possession. The very matter of diminished cheerfulness had been dealt with by Lord Cranworth long before the case of *Colls* (1), and his judgment was there approved. His Lordship had held this not to amount to a nuisance. The standard or measure of right is quite different, and has been defined by this House in *Colls.* (1)

I adhere, as I did in *Colls' Case* (1), to the definition given by Lord Davey (in entire accordance with the judgments of the other noble and learned Lords). According to that definition the quantity of light to which right is acquired in twenty years is "what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind."

My Lords, when a legal question of this kind has been deliberately and unequivocally decided by this House, I do not

(1) [1904] A. C. 179.

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think that it is desirable to re-discuss the question, or to express in other words the rule laid down, for this would be merely to afford fresh topics of controversy. The facts of the present case seem to me to admit of no doubt, and the judgment appealed against to be wrong.

LORD ATKINSON. My Lords, the parties in this case are the owners or occupiers of two adjoining plots of land forming portions of a building estate situate at Acton in the county of Middlesex, a rapidly developing suburban residential district. The deed under which the respondent claims shews in the map attached to it that it is bounded on the west by the building plot of the appellant. Both plots front the Acacia Road, and are substantially of the same extent. The appellant recently erected upon his plot a house not much higher than that built on the respondent's plot, and situate so near the eastern boundary of the plot as to leave only a passage between the house and the boundary ten feet wide.

By building this house the appellant, it is alleged, has obstructed the light which formerly entered a certain room of the respondent's house, called the morning-room, through its western window, and it is to this obstruction the action in the case is now practically confined. The room in question is a small room, 13 ft. 8 in. long by 13 ft. 7 in. wide, and has two windows of the same glass area, 27 ft. 7 in., the one facing north and the other west. The northern window is entirely unobstructed. The eastern wall of the appellant's house subtends an angle, measured from the base of the western window of the respondent's house, of less than 45 degrees, but there can be no doubt that much of the direct western sunlight which formerly entered through the western window of the morning-room is now obstructed, and that that room is thereby rendered less light and cheerful than formerly.

Kekewich J. was of opinion that this brightness and cheerfulness was "one of the chief charms and advantages of the room," and, as I understand, found as a conclusion of fact—(1.) that the room had been an exceptionally well-lighted room, and (2.) that it is now, notwithstanding the obstruction, a

well-lighted room. And by way of commentary on or explanation of this latter finding he states that if the test were "whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question." It would appear to me, therefore, that this second finding of fact must have been intended to amount to, and at all events must be taken to amount to, this, that there is still admitted through the windows of this room an amount of light sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of the room as a sitting-room, or for its comfortable use and enjoyment as a room devoted to any of the other purposes of habitation to which, as part of the respondent's dwelling-house, it might reasonably be devoted.

I entirely accept those findings of fact as so understood, but I cannot concur with the learned judge in the statement that according to the judgment of your Lordships' House in the case of *Colls* v. *Home and Colonial Stores* (1), the sufficiency in the sense above mentioned of the quantity of light left for the enjoyment of the owner of the dominant tenement is not a test. It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James L.J. in *Kelk* v. *Pearson* (2), is "sufficient according to the ordinary notions of mankind for the comfortable use and enjoyment" of his dwelling-house, or of the room in it, as the case may be, no nuisance has, as regards him, been created, and no legal wrong has been inflicted upon him.

Of course, in determining whether or not the quantity of light which the owner of the dominant tenement will, after the obstruction complained of, continue to enjoy is sufficient within the meaning of this decision, regard can only be had to the light which that owner is by grant or prescription legally entitled to enjoy. And light which may with impunity

(1) [1904] A. C. 179. (2) (1871) L. R. 6 Ch. 809.

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be at any time obstructed, windows which may at any time be almost entirely blocked up or altogether darkened, must necessarily be left out of consideration. This is the rule laid down in the case of *Kelk* v. *Pearson.* (1) In *City of London Brewery Co.* v. *Tennant* (2), James L.J., at p. 216, in giving judgment, is reported to have said: "In the case of *Kelk* v. *Pearson* (1) the Lord Justice and myself endeavoured to express what we thought to be the rule applicable to these cases, and I believe the Lord Chancellor entirely agrees with the mode in which it is there expressed"; and Lord Selborne, at p. 218, is reported to have said: "First of all, I wish to express my complete adherence to the view of the law taken in the case of *Kelk* v. *Pearson* (1), correcting some impressions which might have arisen from the language used in former cases by some learned judges." It would appear to me to be perfectly clear that the rule laid down in *Kelk* v. *Pearson* (1) was also approved of by the noble and learned Lords who took part in the decision of *Colls' Case.* (3) Lord Macnaghten refers to it; so do Lords Davey, Robertson and Lindley refer to it, and each with approval; and Lord Halsbury does not dissent from it.

For myself, I may say that I do not think there is any logical halting-place between the position of the learned judges who founded their decisions on the old doctrine of the proprietary right of the owner of the dominant tenement to the continued enjoyment, without sensible diminution, of all the light he enjoyed for the twenty years immediately preceding the interruption complained of and that taken up by the learned Lord Justice in *Kelk* v. *Pearson.* (1) And now that the old doctrine has in *Colls' Case* (3) been declared to be an erroneous doctrine the old position taken by those who adopted and acted upon it must necessarily be abandoned, and the only alternative open is to apply rationally but resolutely the rule and principle founded on the very earliest authorities, and now re-asserted and re-established by the recent decision of your Lordships' House. In my opinion, on the findings of facts of Kekewich J., to which I have referred, this case falls within this latter rule, and

(1) L. R. 6 Ch. 809. (2) (1873) L. R. 9 Ch. 212.
(3) [1904] A. C. 179.

is covered by this latter principle. I therefore think that the judgment of Romer L.J. was right, and that the decision of the Court of Appeal was wrong and should be reversed. The respondent's counsel pressed upon us in argument that Lord Davey, in the passage so often quoted from his judgment in *Colls' Case* (1), at p. 204 of the report, was only dealing with a case in which an extra quantity of light was necessary for some special purpose and had been theretofore enjoyed for that purpose. I do not think that contention is well founded ; to me Lord Davey's remarks appear to be of general application.

LORD LOREBURN L.C. My Lords, your Lordships being equally divided in opinion on the question whether or not the judgment appealed against should be reversed, the rule " Semper præsumitur pro negante," upon which this House always proceeds in such cases, applies. I therefore move your Lordships that the appeal be dismissed, but without costs, the practice being in such cases not to give costs to either side.

Order of the Court of Appeal affirmed, and appeal dismissed without costs.

Lords' Journals, October 25, 1906.

Solicitors : *Redfern & Hunt ; Graham Gordon.*

(1) [1904] A. C. 179.

[HOUSE OF LORDS.]

[COMMITTEE FOR PRIVILEGES.]

H. L. (E.) 1906 Nov. 27.

EARLDOM OF NORFOLK PEERAGE CLAIM.

Peerage—Surrender of Peerage to Sovereign—Grant by Sovereign of surrendered Peerage—Honour—Dignity.

A peer cannot surrender his peerage to the Sovereign in any manner; and this law must be applied to a surrender made in 1302.

In 1302 Roger le Bygod, Earl of Norfolk, surrendered the earldom to Edward I. In 1312 Edward II. granted to Thomas de Brotherton and to the heirs of his body the earldom so surrendered. Thomas de Brotherton was frequently summoned by writ to Parliament and sat there. Lord Mowbray, having proved his pedigree as senior co-heir of Thomas de Brotherton, alleged that the earldom had fallen into abeyance, and claimed that the abeyance should be determined in his favour as senior co-heir:—

Held, that the surrender by Roger le Bygod was invalid; that the charter of 1312 was consequently invalid; that the sitting in Parliament under the King's writ could not create an earldom; and that Lord Mowbray had not made out his claim.

Lord Mowbray, who was also Lord Segrave and Lord Stourton of Stourton, claimed to be Earl of Norfolk in the Peerage of England, as senior co-heir under a charter granted by Edward II. in 1312. By that charter, the material part of which is set out in Lord Ashbourne's speech, Edward II. granted to Thomas de Brotherton and the heirs of his body lawfully begotten the earldom which Roger le Bygod, Earl of Norfolk, had surrendered to Edward I. in 1302. Lord Mowbray alleged that that earldom went into abeyance in 1478, and prayed that the abeyance might be determined in his favour as senior co-heir of Thomas de Brotherton.

This claim was opposed by the Duke of Norfolk, who held among his other titles that of Earl of Norfolk under a charter granted by Charles I. in 1644 to Thomas Howard, whose heir the Duke was.

A great part of the argument addressed to the Committee dealt with the question whether the principle of abeyance which prevails in baronies is applicable to earldoms, the learned

counsel for Lord Mowbray contending that it is, and the learned counsel for the Duke contending that it is not. Upon this question the Committee expressed no opinion.

July 2, 5, 6, 9, 12. *Sir Robert Finlay, K.C.*, and *G. D. Burtchaell* (*A. C. Fox-Davies* with them), for Lord Mowbray, rested their case upon the charter of 1312, and upon the fact that Thomas de Brotherton was frequently summoned by the King's writ to Parliament and sat accordingly.

Warmington, K.C., and *Lord Robert Cecil, K.C.* (*Stuart Moore* with them), for the Duke of Norfolk, pointed out that the surrender by Roger le Bygod of the Earldom of Norfolk, though no doubt believed at that time to be valid, was really invalid, and they cited Collins (Proceedings and Precedents) and the other authorities referred to in their Lordships' speeches as conclusive on this point. They also urged that, the surrender being invalid, the charter of 1312 was equally invalid, being based entirely upon the surrender; and that the fact that Thomas de Brotherton had frequently sat in Parliament under the King's writ of summons in no way entitled him to the earldom claimed under the charter of 1312.

Sir Robert Finlay, K.C., in reply, contested these propositions, and argued that the authorities referred to, being centuries later than the surrender, ought not to be read retrospectively.

Sir John Lawson Walton, A.-G. (*G. R. Askwith* and *Geoffrey Ellis* with him), for the Crown.

The Committee took time for consideration.

Nov. 27. EARL OF HALSBURY. My Lords, in this case the claimant seeks to establish his right to the Earldom of Norfolk, an earldom created in the person of Hugh le Bygod in 1135. It may be assumed that he has satisfactorily established his pedigree, but in the course of it he is compelled to admit that he is not heir to the earldom so created, but has to rely on a surrender of the earldom to the King in 1302 and a grant in 1312 to Thomas de Brotherton of the earldom so surrendered. Now the claimant has undoubtedly proved his descent from Thomas de Brotherton,

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EARLDOM OF NORFOLK PEERAGE CLAIM.

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but the fatal blot in his case is that the surrender upon which he relies is invalid in law. It is settled law "that no peer of this realm can drown or extinguish his honour (but that it descend to his descendants) neither by surrender, grant, fine, nor any other conveyance to the King." This has been repeatedly held to be the law for some centuries, and finally in the Report on the Dignity of a Peer it is stated that such must now be held to be the law: vol. 2 of the Third Report on the Dignity of a Peer, pp. 25, 46.

This is binding on your Lordships. Something was suggested by the learned counsel as to what law or what understanding of the law your Lordships ought to apply. I know of no such jurisdiction as applicable to the law of England. Our duty is to the best of our ability to ascertain what the law is, and, having ascertained it, to give effect to it; to alter it or even modify it is the function of the Legislature, and not of your Lordships' House. No stronger illustration of this principle can be given than when, so lately as 1818, the Court of King's Bench, with Lord Ellenborough presiding, felt itself compelled to allow a claim to wager of battle in an appeal of murder (1), and but for the intervention of an Act of Parliament, 59 Geo. 3, c. 46, some of His Majesty's judges might have had to preside over a single combat between the appellant and his antagonist.

I think Sir Robert Finlay was correct in saying that the King's writ, followed by a sitting in Parliament, of itself created a peerage, but assuming it did, it would not of itself create an earldom. An earldom was an office as well as a dignity, and the office was full of the heir of the Bygods; and the rank of an earl could not be conferred merely by the Sovereign addressing the peer by that title even if it had been possible to create two earldoms for the same county. The somewhat archaic form which up to the present day accompanies the creation of an earldom shews the manner in which such a dignity can be created.

I move your Lordships that we report to the House that the claimant has not established his claim to the dignity in question.

(1) See *Ashford* v. *Thornton*, 1 B. & Ald. 405, in which case the appellant declined to proceed further after the decision of the Court on the main point, see at p. 460.

LORD ASHBOURNE. My Lords, Lord Mowbray claims that he is entitled to the Earldom of Norfolk, created by the charter of December 16, 6 Edw. 2, 1312. That charter opens with the following words: "The King to Archbishops &c. greeting, Know ye that we have given, granted, and by this our charter confirmed to Thomas de Brotherton, our very dear brother, all the right and honour and Lordship, which Roger le Bygod formerly Earl of Norfolk, and Marshal of England, had by the name of Earl in the county of Norfolk, and which came to the hands of the Lord Edward, (the first) of famous memory, formerly King of England, our father, by the grant, surrender, remise and quitclaim of the same Earl, and are in our hand, to have and to hold to the same Thomas and his heirs of his body lawfully begotten of us and our heirs, with all and singular things thereto belonging by whatsoever name they may be called as entirely as the aforesaid Earl had and held them on the day of the grant, surrender, remise and quitclaim aforesaid for ever."

The earldom that was granted to Thomas de Brotherton in 1312 was the earldom that had been held by Roger le Bygod and had been surrendered by him to King Edward I. in 1302. The suggestion made—not very strenuously—in argument that the charter might be regarded as conferring a new and independent Earldom of Norfolk on Thomas de Brotherton, apart from the Bygod earldom, cannot, I think, be maintained on any fair construction of that document. The fact that Thomas de Brotherton was repeatedly summoned to and sat in Parliament under the grant of 1312 cannot be considered as conferring any right to the earldom apart from the charter. No such case is advanced in his documents by the claimant, who was probably advised that a writ of summons and subsequent sitting in Parliament may ennoble the blood and confer right of peerage, but would hardly be accepted as sufficing, of itself, to confer an earldom. The matter is fully discussed in the Third Report on the Dignity of a Peer, vol. 2, pp. 116, 120, and Cruise on Dignities, p. 228.

Therefore a decision is primarily required on the legal construction and effect of the charter of 1312. Assuming the pedigree of the claimant to be established (and it is not

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Lord Ashbourne.

disputed), and that there is no constitutional or legal difficulty in applying the practice of calling out of abeyance to earldoms as well as to baronies (which it is not now necessary to discuss), has Lord Mowbray made out his claim to the Earldom of Norfolk granted to Thomas de Brotherton in 1312?

That earldom was the earldom of Roger le Bygod, as held by him at the date of its surrender to King Edward I. in 1302. If that surrender was legal according to peerage law, then the earldom of Roger le Bygod was vested in the Crown, and could be regranted in any subsequent year to any other subject. But was it legally competent for an earl or any other peer to surrender or destroy his earldom or peerage? Can any peer, by his mere personal act, oust and kill the rights of those entitled in remainder—it might be his children, brothers, or near kinsmen? Roger le Bygod had a brother living in 1302, and other kinsmen are stated to have been subsequently in existence. Supposing a claimant should now appear, proving a clear descent from a Bygod entitled to the old earldom, what answer could be made?

This case was not put forward until his supplemental case by the Duke of Norfolk, but it was fully argued before your Lordships. It is manifest that Lord Mowbray never anticipated how this argument would be pressed against his claim, for in his supplemental case it is stated "a peerage of England is inalienable and cannot be sold, resigned or relinquished."

The question really is narrowed to this, Had Roger le Bygod the legal right to make a valid surrender of the Earldom of Norfolk in 1302? The law on the subject does not now appear open to any doubt, and whenever the question came before your Lordships' House the opinions expressed gave no sanction to any contrary intention. In 1626 Doddridge J., in the Earl of Oxford's case advised the House: "If a man be created earl to him and to his heirs, all men do know that although he have a fee simple yet he cannot alien or give away this inheritance, because it is a personal dignity annexed to the posterity and fixed in the blood": Collins, p. 190.

In the Grey de Ruthyn case, in 1640, à resolution of this House put the proposition with absolute clearness. It is

printed in the Third Report on the Dignity of a Peer, p. 25, vol. 2: "That no peer of this realm can drown or extinguish his honour (but that it descends unto his descendants), neither by surrender, grant, fine, nor any other conveyance to the King."

In 1678 the net question presented itself for decision in the Purbeck case, and the resolution of the House was distinct and unqualified: Collins, p. 306. "No fine now levied nor at any time hereafter to be levied to the King can bar such title of honour or the right of any person claiming such title under him that levied or shall levy such fine." The House proceeded as if it were declaring clear law, and not as if they were laying down any novel proposition. The precedents of surrenders that had been cited were brushed aside, as having passed sub silentio, and without contest. No case was then cited, and none was cited before us, where this House gave any countenance to the contrary proposition.

It is not denied that the law is now clear, but it is urged that it is hard and unreasonable to apply it to such an early date as 1302, that it was not then known or declared. On the subject of hardness and unreasonableness, it is not unworthy of note that this is not a case of disturbing and upsetting a long possession. On the contrary, it is a claim to call a title out of abeyance, after over four centuries.

If the law is clear, how can we avoid applying it? The law did not begin in 1626, or 1640, or 1678. It was suggested that although no date could be arbitrarily fixed for its starting point, may be it would be reasonable to say that it should not be applied until our parliamentary system was established. But even if that canon was laid down I do not think it would help Lord Mowbray, for it could not be urged that the condition suggested was not satisfied before 1302, the date of the surrender. What has been called "the model Parliament" met in 1295, and it is manifest that from that date, at all events, our parliamentary system must be regarded as established: see Stubbs' Constitutional History of England, ch. 15, and the recent Political History of England, vol. 3, ch. 10.

In my opinion the claimant has failed to make out his case, and I concur in the resolution moved by my noble and learned friend.

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LORD DAVEY. My Lords, I had prepared some notes as material for a judgment in this case, which have been read, and I believe approved, by some of your Lordships; but I do not propose to trouble you at any length, because I should only be repeating what has already been said by my noble and learned friends. As they have truly said, the real question is whether the claimant has made out a title in his ancestor to the Earldom of Norfolk which he claims.

Now, my Lords, there cannot, I think, be any doubt about the construction of the charter of Edward II. in 1312. The terms of that charter, which have been read by my noble and learned friend beside me (Lord Ashbourne), are plain and unambiguous. It is therefore Bygod's earldom which Bygod had purported to surrender into the King's hands that the King purports to grant to Thomas de Brotherton. It was not, and did not, operate as a new creation of a new earldom. Indeed, it may be doubted whether, having regard to the original conception of an earldom as an office, the lawyers of that day would have admitted the possibility of there being two earls of the same county.

Now, my Lords, there is no doubt that a man cannot alien a title of honour either by surrender to the Crown or by grant to a subject. This is now settled law, and the reason is this, that it is a personal dignity which descends to his posterity and is fixed in the blood. In other words, he cannot by his own act alter or affect the status of his descendants or the other persons in the succession. But it has been suggested rather than argued that, although this is now recognized to be the law, it was not accepted or treated as law in the reign of Edward II., and that the grant of 1312 ought to be treated as valid and effect given to it in accordance with the ideas of the fourteenth century, and not according to those which now prevail. This contention appears to me to be based on a fallacy, and to involve a misapprehension of the nature of the jurisdiction exercised by your Lordships in peerage cases. Whenever a Court or this House, acting judicially, declares the law, it is presumed to lay down what the law is and was, although it may have been misunderstood in former days, and this House is bound by its own declarations of the law in all matters within its jurisdiction. In fact, this House,

exercising its judicial functions, has no jurisdiction or power to alter the law when once ascertained in a binding way.

My noble and learned friend who preceded me referred your Lordships to the opinion expressed by Doddridge J. when advising this House in the Earl of Oxford's case in 1626, the resolution in the Grey de Ruthyn case in 1640 and that in the Viscount Purbeck's case in 1678. My Lords, I venture to say that no lawyer can doubt that according to the true construction of these resolutions they are, and are intended to be, retrospective. And this point is brought out clearly, in the opinion of Lord Shaftesbury, in the Purbeck case, which I think the ruling one. A number of precedents to the contrary effect had been cited by the Attorney-General in argument (as they have been to your Lordships), including that of the surrender of the Earldom of Norfolk now in question. Lord Shaftesbury's comment (reported in Collins, p. 305) was: "So that all his precedents passed sub silentio and never contested. If any of these surrenders had upon a dispute been adjudged good, Mr. Attorney had offered your Lordships something." On that ground he disregarded the ancient precedents. I think it impossible to treat these resolutions as laying down a new rule for the future only or meaning no more than "fieri non debuit factum valet." That would be the office of legislation, not of judicial decision.

Another argument has been used which appears to me to involve a confusion between a right of peerage and a title of honour conferring a particular rank in the peerage, which is a matter merely collateral. The argument to which I refer is that even if the surrender by Bygod was invalid, yet the grant to Thomas de Brotherton, followed by his sitting in Parliament as Earl of Norfolk, would confer the dignity of an earl upon him and give him the status of an earl.

I pass by the objection that this title by sitting in Parliament is not claimed in the claimant's petition and consider the argument on its merits. Historically, a right of peerage is a right to be specially summoned by name to Parliament, and when so summoned to sit amongst the Majores Barones. According to law as we now understand it, the heirs of a person so summoned

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Lord Davey.

and sitting are entitled to be summoned in like manner or (in modern language) have a right of peerage. But it has never been held that such a writ followed by sitting will confer title to any particular rank in the peerage, which could only be done in the accustomed way. The writ followed by sitting would no doubt confer peerage on Thomas de Brotherton if he had it not before, but would not confer an earldom on him although he should have been summoned by that description. This point is dealt with at large in the Third Report on the Dignity of a Peer: see vol. 2, pp. 116 and 120. The general conclusion the Commissioners come to is that originally the earls were summoned to Parliament because they were barons, and not because they were earls, and that naming a person as an earl in the writ of summons did not create him an earl as in the case of the Norman earls and Scotch earls, who were also barons in England and were styled earls in their writs of summons, but were not thereby created earls of England.

For these reasons I concur in the resolution proposed by the noble and learned Earl.

LORD JAMES OF HEREFORD. My Lords, I wish only to express my concurrence in the opinions which have already been presented to your Lordships' House.

VISCOUNT KNUTSFORD. My Lords, I only desire to say that I concur in the view that the claimant has failed to make out his case; and for the grounds on which that decision has been arrived at I would refer to the statements which have been so fully made by the noble and learned Lords opposite (Lord Ashbourne and Lord Davey).

Resolved, that the Committee do report to the House that the petitioner has not established his claim to the dignity in question.

Lords' Journals, November 27, 1906.

Solicitors: *Upton & Britton; Few & Co.; Wilsons, Bristowe & Carpmael.*

[HOUSE OF LORDS.]

SIR WROTH PERIAM CHRISTOPHER LETHBRIDGE, BARONET . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

H. L. (E.) 1906 Dec. 3.

Revenue—Estate Duty—Policy of Life Insurance—Interest provided by the Deceased—Family Arrangement—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*d*); *s.* 3.

A tenant for life of real estates had raised money by charges on his life estate and insurance policies on his life. By a family arrangement in 1885 between him and his son (the tenant in tail) the estates were disentailed and re-settled; the fee was mortgaged by father and son for an amount to pay off the father's debts; the policies were assigned to the son; the rents and profits of the estates were held in trust to pay the interest on the mortgage, the premiums on the policies, an annuity to the son, and the residue to the father for life, with remainder to the son in fee. On the father's death the policy moneys were paid to the son, and the Crown claimed estate duty thereon from the son under the Finance Act, 1894, s. 2, sub-s. 1 (*d*):—

Held that, in the true view of the family arrangement, the son had made an absolute purchase of the policies for valuable consideration—nay, for much more than the full value; that this was not a case of an "interest provided by the deceased, either alone or in concert with any other person" within the meaning of s. 2, sub-s. 1 (*d*); and that estate duty was not payable on the policy moneys.

Decision of the Court of Appeal, [1905] 2 K. B. 323, reversed and decision of Phillimore J. restored.

THE facts and deeds material to this appeal are fully set out in the report in the Court below, and sufficiently for the present report in the judgments of this House.

June 26, 28. *Lush, K.C.*, and *à Beckett Terrell*, for the appellant.

By the arrangement of 1885 the policies became the property of the appellant, and no interest in them remained in his father. On the death, therefore, of the father no property passed to the appellant. The policy moneys were not "property of which the deceased was at the time of his death competent to dispose" under s. 2, sub-s. 1 (*a*), of the Finance Act, 1894, or "in which the

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deceased . . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises" under (*b*). Insurance money might be taxable under (*c*) as being liable to account under the Customs Acts, 1881 and 1889, but only in cases where the premiums had been paid by the assured for the benefit of the donee. Here, however, they were not so paid. Policy money is not liable under (*d*): "Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person." The Court of Appeal was wrong in holding that these words include policies. But on any construction no "beneficial interest" arose to the appellant by his father's death. The family arrangement was not a benefit, but a burden by which the appellant lost heavily. The case in this respect is covered by *Lord Advocate* v. *Earl of Fife* (1), under the Succession Duty Act, where no duty was held to be payable by Lord Fife for policy moneys acquired by an onerous transaction. In *Attorney-General* v. *Murray* (2) policy-moneys under a family arrangement were held not liable to duty. In *Attorney-General* v. *Dobree* (3) the duty was payable because it was a simple case of a husband paying the premiums under a covenant in a marriage settlement for the benefit of his wife. So in *Attorney-General* v. *Robinson* (4) the husband settled the policies, and the premiums were paid out of the wife's income; and duty was held payable. These cases are inapplicable. *Attorney-General* v. *Hawkins* (5) is really in favour of the appellant, because, though duty was held to be payable, Phillimore J. expressly limited the amount to the extent of the real beneficial interest. But here in 1898 the father conveyed his life estate to the appellant so as to effect a merger with the inheritance in the latter. Thereafter for some years the appellant paid the premiums out of his own property. In *Earl Cowley* v. *Inland Revenue Commissioners* (6) Lord Macnaghten says: "The principle on which the Finance Act, 1894, was founded is that whenever property changes hands on death, the State is entitled to step in and take

(1) (1883) 11 R. 222.
(2) [1904] 1 K. B. 165.
(3) [1900] 1 Q. B. 442.
(4) [1901] 2 I. R. 67.
(5) [1901] 1 K. B. 285.
(6) [1899] A. C. 198, at p. 210.

toll of the property." There was no change of hands in the present case. The policies had been the appellant's since 1885, and he had paid the premiums since 1898. *Lord Advocate* v. *Fleming* (1) is in point. There was an out and out purchase for full consideration of the policies of the appellant: *Fryer* v. *Morland.* (2)

Sir Robert Finlay, K.C., and *Vaughan Hawkins* (*Sir J. Lawson Walton, A.-G.*, with them), for the respondent. The claim of the Crown is valid, under s. 2, sub-s. 1 (*d*): "Any annuity or other interest purchased or provided by the deceased . . . . in concert or by arrangement with any other person." In 1885 a family arrangement was constituted by which the premiums were provided out of the life interest of the father. The policies were an "interest" within the sub-section. They are not within the exceptions enumerated in s. 3, as the appellant did not buy them "for full consideration in money or money's worth paid to the vendor." The father created a trust for the maintenance of the policies which were not really purchased at all. The subsequent dealings did not affect or modify the original arrangement, which in respect of the policies was a provision made by a father for the benefit of his son. The purchase in 1898 of the life interest was made subject to the trusts of the settlement, one of which was the payment of the premiums. All that the appellant purchased was the value of the life interest minus the premiums. In a succession of cases assurance policies have been held liable to duty under s. 2, sub-s. 1 (*d*). In *Attorney-General* v. *Murray* (3) the word "interest" was held to include policies. In that case Cozens-Hardy L.J. followed the decision of Palles C.B. in *Attorney-General* v. *Robinson.* (4) The latter case and *Attorney-General* v. *Dobree* (5) are decisively in favour of the Crown. Here the policies were assigned to the appellant, and the right to receive the money was an interest which "passed" on the death of the father. Sect. 2, sub-s. 1 (*a*), (*b*) and (*c*), include property in which the deceased had himself no interest, but of which he was "competent to dispose," or which passed, or was deemed to pass, on his death.

(1) [1897] A. C. 145.
(2) (1876) 3 Ch. D. 675.
(3) [1904] 1 K. B. 165.
(4) [1901] 2 I. R. 67.
(5) [1900] 1 Q. B. 442.

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Thus the question whether the policies at any time belonged to the father is immaterial. This is not a case, such as is described by Darling J. in *Dobree's Case* (1), where a man purchases a thing of which the enjoyment is postponed: see also per Channell J. in the same case, p. 452, on the word "donee." The mere fact that the appellant might have surrendered or sold the policies before his father's death does not affect the character of the transaction. The distinction between a sale and a family arrangement is shewn in *Brown* v. *Attorney-General.* (2) The present appeal is like *Attorney-General* v. *Hawkins* (3), where under a family arrangement such as the present policies payable to the son were made liable to estate duty. Both were cases of a provision made by the father for the benefit of the son, and not a purchase for value.

Lush, K.C., in reply.

The House took time for consideration.

Dec. 3. LORD LOREBURN L.C. My Lords, the question raised by this appeal is whether estate duty should be paid on a sum of money received in discharge of fifteen life policies which fell due on the death of Sir Wroth Lethbridge, deceased. I will call him the father, for the present appellant, his son, is also Sir Wroth Lethbridge.

The father originally effected these fifteen policies on his own life, and, after maintaining them for some time, assigned them to his son under a family arrangement, or series of arrangements, necessitated by his (the father's) pecuniary difficulties. In substance it came to this, that the son mortgaged his inheritance in the family estates to save his father, and the father in return assigned these policies, together with an annual sum out of his life interest in the same estate sufficient to pay the premiums, and also to pay an annuity during their joint lives. In my opinion we have nothing to do with these transactions beyond what suffices to answer this question: Did the son give in money or money's worth full consideration for the

(1) [1900] 1 Q. B. 442. (2) (1898) 79 L. T. 572.
(3) [1901] 1 K. B. 285.

policies and the other advantages he acquired under the arrangement? It is indisputable that he gave full value and more. He made sacrifices as a son for his father's sake.

Having taken over these policies the son might have allowed them to lapse. He preferred to keep them alive, and paid the premiums, in substance, out of the moneys he received annually from the life interest of his father pursuant to the family arrangements. He might have spent that money otherwise had he pleased, but, even if he had not been free to spend it as he liked, that circumstance would have made no difference in my opinion. The son had given full value for the annual payments which were to be made to him out of the life estate. Therefore it could not be said that the father was keeping up the premiums on these policies, though the money which kept them up came out of his life estate.

In these circumstances it was argued for the Crown that, under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, the fifteen policies constituted an interest purchased or provided by the father by an arrangement with the son, and that estate duty was accordingly payable. That was the only ground upon which the Crown rested a claim.

The general purpose of this sub-section is to prevent a man escaping estate duty by subtracting from his means, during life, moneys or money's worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death. Now it is not subtracting from his means if the deceased has received a full equivalent in return for whatever he has laid out. In this case, from the date when the policies were assigned, and the obligation to find out of the life estate enough to pay the premiums was created (for all of which full value was given), no further liability was incurred, nor sacrifice made by the father in connection with these policies. He purchased nothing and he provided nothing. What he originally expended in acquiring and maintaining the policies till their assignment was compensated, what he stipulated by the family arrangement to do in future years was also compensated, by the consideration proceeding from the son; and thenceforward he had no title to, nor concern with, the policies.

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I desire to limit my opinion to that ground. There may be cases where the deceased has not so fully cut himself and his estate adrift from the interest which he originally created, and yet no estate duty may be payable. But in this case it is exactly the same as if the father had never been concerned in the policies at all, and had never paid a single premium, for he parted with the whole thing to a purchaser. Accordingly the sub-section, in my opinion, has no application to the case, and the appeal prevails.

I am not quite sure that I rightly interpret what is said in the Court of Appeal with regard to family arrangements. No doubt Courts of Equity will sustain such arrangements, if they can, to save the family honour, and apart from the adequacy of the consideration on either side. But if, in any proceeding, it be relevant to inquire whether the consideration for assigning property was adequate or not, that can be ascertained as well in a case of family arrangement as in any other, and in the same way. The fact that the transaction was a family arrangement is not inconsistent with its being also a purchase for full consideration in money or money's worth. If I thought that the case fell within s. 2, sub-s. 1 (*d*) (as I do not), I should still think that these policies were exempted from estate duty by virtue of s. 3, sub-s. 1, of the same Act, upon the ground that there had been a purchase for full value within the meaning of that section. But, in the view I take, this point does not arise.

LORD MACNAGHTEN. My Lords, differing from Phillimore J., the learned judges of the Court of Appeal hold that "estate duty must be paid on the full amount received in respect of all the fifteen policies" on the life of the late Sir Wroth Acland Lethbridge, which were made over to his son in pursuance of a family arrangement when the Lethbridge estates were resettled in 1885.

Their view is that "the fifteen policies were 'provided' by the father, by arrangement with the son, by means of the application of part of his income in paying the premiums which kept the policies alive." They consider that the case comes under s. 2, sub-s. 1 (*d*), of the Finance Act, 1894. They say that if

nothing had occurred to disturb the arrangement, and "the policies had been kept up under the trust of 1885 until the father's death in November, 1902, the case would clearly have fallen within sub-s. 1 (*d*)."

The learned judges then proceed to consider the subsequent dealings between father and son and the purchase of the father's life interest by the son in 1898.

I do not propose to trouble your Lordships with any observations on the latter part of the judgment of the Court of Appeal, because it appears to me that the policies were not "provided" by the father within the meaning of that expression in the Act. It was not by the father's gift, or at his cost, or by means of any expenditure on his part, that the policies were vested in the son. After they became vested in the son they were, as it seems to me, kept up at the son's sole expense, and not to any extent or in any sense by the application of any part of the father's income.

The policies which had been effected in support of a charge on the father's life interest were redeemed by moneys raised by a charge upon the inheritance. The son, in my opinion, acquired them by purchase. He gave more than an equivalent for what he received. Any respectable insurance company would have dealt with him on much easier terms. If pecuniary considerations alone are to be regarded, the transaction seems to have been a most disadvantageous bargain for the son. However that may be, the son undoubtedly gave valuable consideration for the policies, and they were made over to him absolutely.

The learned judges of the Court of Appeal seem to think that after the policies were assigned to the son the father still retained some interest in them or some concern in the arrangement which they describe as "the trust of 1885." They intimate that it would have been the duty of the trustees to apply any bonus declared on a policy in reduction of the annual premium. With the utmost deference, it seems to me that there is no foundation for this view. "All moneys assured by or to become payable by or under the said policies"—all bonuses accrued or to accrue—became by assignment for valuable consideration the absolute property of the son and payable to him alone. Neither the father nor the trustees could have prevented

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the son from receiving a bonus or compelled him to apply a bonus in reduction of a premium.

The only other question is, What was the position of the son with regard to the annual sums which, in pursuance of the family arrangement of 1885, were to be devoted to keeping up the policies? In my opinion those annual sums belonged to the son and to no one else. The Court of Appeal say that "in one event only could the son claim to be paid the 864*l.*, namely, in the event of his electing to surrender the policies." There, with all respect, I differ. It seems to me that the son could have called upon the trustees to hand over the 864*l.* to him whether the policies were surrendered or not. There was no trust in favour of the father or anyone else, only a direction or order in the performance of which no one but the son could possibly be interested and which he could therefore countermand. No doubt the trustees would have made a difficulty about it; they were put there for the very purpose of making difficulties. Probably they would have declined to hand the money over without the sanction of the Court. And they would have been justified in so doing. The whole object of this elaborate arrangement was to prevent the son from looking upon the sums intended to be applied in keeping up the policies and so preserving or restoring the family property, as part of his own income which he was free to spend as he liked.

If the case does not fall under s. 2, sub-s. 1 (*d*), it is not suggested that the policy moneys are caught by any other provision in the Act.

In the result, therefore, I am of opinion that the appeal ought to be allowed and the judgment of Phillimore J. restored, with costs here and below.

Lord Atkinson. My Lords, I concur in the opinion that the decision of the Court of Appeal in this case was wrong and should be reversed, and that the decision of Phillimore J. should be restored. It has many times been decided that in dealing with questions arising on the Finance Act of 1894 and the Succession Duty Acts regard should be had to the substance of the transactions on which these questions turn rather than to

the forms of conveyancing which the parties to them may have adopted to carry out their objects.

If in this case the arrangements entered into between the appellant and his father in 1885 be so regarded, they in substance and effect appear to me to amount to this, that in consideration that the appellant would burden his inheritance with the sum of 71,000*l.* fifteen policies of assurance were assigned to him, and an annuity amounting to 1000*l.* plus a sum equal to the amount of the premium on those policies was made payable to him or for his use and benefit out of the rents of the estate annually during the joint lives of himself and his father. No doubt the deed of August 19, 1885, created a trust to raise and pay out of the rents the premiums on these policies, but it was entirely optional with the appellant whether the policies should be kept up or not. If he elected to surrender them or any of them he could not only retain the surrender value for his own purposes, but his annuity of 1000*l.* per annum would be augmented by a sum equal in amount to the premiums on the policies surrendered.

In a financial point of view the bargain must, I think, be taken to have been a bad one for the appellant. The moneys secured by the policies, including all the bonuses declared up to the month of June, 1885, only amounted to the sum of 30,067*l.* 4*s.* 2*d.* Their surrender value on August 19, 1885, is not stated, but it must, one would think, have been considerably less than 30,000*l.* If, therefore, the appellant had surrendered all the policies immediately after they were assigned to him, as he was quite entitled to do, and had applied the money received, assuming it to amount to 30,000*l.*, in part discharge of the mortgage debt of 71,000*l.*, the financial position would have been this: his inheritance would have remained charged with 40,000*l.*, and he would have been entitled in consideration of that charge to receive during the joint lives of himself and his father an annuity of 1864*l.* per annum, about $4\frac{1}{2}$ per cent. on the amount of the incumbrance. The appellant undoubtedly gave full value in money or money's worth for all the benefits he received. If Sir Wroth Acland Lethbridge and the appellant had been strangers to each other, or merely friends instead of father and

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son, it could not, I think, be contended that these policies were not purchased for "money or money's worth" within the meaning of the 3rd section of the Finance Act; but because filial affection or family pride, or a desire to relieve a father from embarrassment, may have induced the appellant to make this bargain and to pay an extravagant price for the benefits he received under it, the transaction, it is urged, is to be treated as a family arrangement and not a purchase at all.

I think that is to confound the motive which induces to a transaction with the transaction itself; and I utterly fail to see how a transaction which would be regarded as a purchase if it took place between strangers, and would therefore be outside the Act, is to be brought within the Act because the parties to it are members of the same family and the interests or honour of the family induced to or were promoted or protected by it.

It is clear from the 2nd sub-section of s. 3 that a transaction may amount to a purchase though the consideration given comprise something in addition to money or money's worth. In that respect s. 3 differs altogether from s. 17 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). I think on this point the case is covered by the decision of *Lord Advocate* v. *Earl of Fife*. (1) The fact that the policies of assurance were assigned out and out to the appellant, and that he could surrender them if he was so disposed, is the very circumstance which distinguishes this case from *Attorney-General* v. *Hawkins*. (2) It is plain from the judgment of the judges on this latter case that if anything of the kind had existed there the decision would have been against the Crown: *Brown* v. *Attorney-General*. (3)

For the reasons mentioned by my noble and learned friends the Lord Chancellor and Lord Macnaghten, this case does not in my opinion fall within s. 2, sub-s. 1 (*d*).

My Lords, I am therefore of opinion that the appeal should be allowed and the decision of Phillimore J. restored.

LORD ROBERTSON. My Lords, I agree with the judgment of the Lord Chancellor.

(1) 11 R. 222. (2) [1901] 1 K. B. 285.
(3) 79 L. T. 572.

Lord Loreburn L.C. My Lords, I have heard from my noble and learned friend Lord James of Hereford, who is unable to be present to-day, that he concurs in the opinion that our judgment ought to be for the appellant.

Order of the Court of Appeal reversed, and judgment of Phillimore J. restored, with costs here and below.

Lords' Journals, December 3, 1906.

Solicitors: *Tomlin & Chitty; Sir F. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL AND BOARD OF EDUCATION . . . . . } Appellants;

AND

COUNTY COUNCIL OF THE WEST RIDING OF YORKSHIRE . . . . } Respondents.

GRENSIDE, ... *Ex parte* Appellant.

Schools (Education) — Non-provided School—Salary of Teachers — Time occupied in Religious Instruction—Proportionate Reduction from Salary —Power of Local Authority to reduce—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75)—*Education Act,* 1902 (2 *Edw.* 7, *c.* 42).

A local education authority does not "maintain" a non-provided school as required by the Education Act, 1902, s. 7, sub-s. 1, if it refuses to pay what is reasonable for denominational religious instruction lawfully given during school hours.

Decision of the Court of Appeal, [1906] 2 K. B. 676, reversed and decision of King's Bench Division restored.

In four non-provided schools (three being National schools and one a Roman Catholic) the respondents, as the local education authority, deducted from the teachers' salaries amounts comparatively small and proportionate to the time spent in giving religious or denominational instruction during school hours. The Board of Education having made an order upon the respondents to pay the amounts deducted, the King's Bench Division

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(Ridley, Darling, and Bray JJ.) made absolute a rule for a mandamus requiring the respondents to pay. This decision was reversed by the Court of Appeal (Collins M.R. and Farwell L.J., Moulton L.J dissenting). Hence the present appeal.

Dec. 5, 6, 10. *Sir J. Lawson Walton*, *A.-G.*, and *Sir W. S. Robson*, *S.-G.* (*Rowlatt* with them), for the appellants. Under the Act of 1870 there were two classes of schools, one of publicly provided, or board schools, which were in part supported by the rates, and the other of denominational schools, which were dependent largely on voluntary efforts. Both, however, in respect of secular instruction received grants from the State. There was no public inspection of the religious teaching in either class of school, though the board schools were permitted to give religious education within the limits of the Cowper-Temple clause. The main purpose of the Act of 1902 was to remove the inequality between the provided and non-provided schools. The provided were left in their former position, but the non-provided for the first time were entitled to assistance from the rates. They were to be maintained in full force, including the religious curriculum. Without that curriculum they could hardly be termed schools at all. It was the schools as such, not a particular part of the instruction, which were to be maintained under the statute. The duty of the local authority is defined in s. 7 of the Act; it is to "maintain and keep efficient all public elementary schools within their area." The non-provided are "public elementary schools" as much as the provided schools. The words "maintain and keep efficient" are borrowed from s. 18 of the Act of 1870. The efficiency of board schools included Cowper-Temple religious instruction, where given, and the new authority, which under s. 5 is to have "the powers and duties of a school board," has in like manner to "maintain and keep efficient" as a whole the schools within its jurisdiction, whether provided or non-provided. In both classes of schools religion was an integral part of the curriculum. The only difference under the Act of 1902 is that the managers of non-provided schools find the building. No doubt under the Act of 1870 Cowper-Temple instruction was optional, but it was

usually given, and when given the ratepayers had to pay for it. If it should happen that Cowper-Temple instruction should be given in a non-provided school, it would follow from the respondents' contention that in one case the teaching would fall on the rates and in the other would not. If it had been intended that there should be an apportionment between secular and religious teaching, it is inconceivable that no scale or method should have been provided. In s. 7, sub-s. 2, minute provision is made for the costs to be borne by the managers and the education authority respectively in regard to the use of a room and the damage caused to furniture by such use out of school hours. It is true that there is no religious inspection to be provided by the education authority; but there was none under the Act of 1870 with regard to Cowper-Temple teaching. In both cases the education authority has to "maintain," i.e., to defray all expenses, and "keep efficient," i.e., to provide full equipment for the institution as a whole. It is no doubt provided in s. 5 that the local authority is only to have the control of secular instruction in non-provided schools. But it is for the managers—especially the foundation managers—to uphold the continuity and see to the religious teaching. The education authority has to maintain and keep efficient, and the managers to control. The position is analogous to that of a Roman Catholic chaplain in a workhouse. The guardians could not test his orthodoxy, but they could see that he attended and visited the inmates and performed divine service. By s. 76 of the Act of 1870 inspection of religious instruction in board schools was provided for by other than Her Majesty's inspectors. This was held in school hours, and opportunity was given for the withdrawal of pupils by their parents, if desired. The financial section of the Act of 1902 is s. 7, which gives to the local education authority "the control of all expenditure." There is no qualification. Sect. 18 in the Act of 1902 corresponds with s. 53 of the Act of 1870. In the latter the expenses of the school board were to be paid out of the "school fund," the deficiency between the fees of scholars together with the parliamentary grant and the actual requirements being made up from the rates. In s. 18 of the Act of 1902 the cost is, "so far as not otherwise provided for," to be borne by the county or

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borough fund. Neither in the Act nor in the Code is there anything to suggest a separation in respect of cost between secular and religious instruction.

Danckwerts, K.C., and *Avory*, K.C. (*Sargant* with them), for the respondents. Under the Act of 1902, as under that of 1870, voluntary schools are free to come under the Act or stay out of it. It is, however, an error to assume that all the non-provided or voluntary schools must be connected with some religious denomination. All that is required is that a school must fulfil the conditions necessary to the earning of a parliamentary grant. The term "public elementary school" is applicable to every school, whether denominational or not, which earns the grant. The appellants have confused the obligatory and non-obligatory elements in the term. A definition includes only the qualities which distinguish the class defined from other classes; and where a term is applied to two classes of things it connotes only the elements which are common to both. The term "public elementary school" implies neither the presence nor the absence of religious teaching. In the Voluntary Schools Act, 1897, "the expression 'voluntary school' means a public elementary day school not provided by a school board." There is no reference to religion. The word "elementary" was rigidly construed in *Reg.* v. *Cockerton* (1) and in *Dyer* v. *London School Board*. (2) Under the Act of 1870 the school boards had an option to teach religion or not; and the parents could withdraw their children from the religious lesson. Sect. 63 of that Act dealt with defaulting school boards. A board could never have been in default for not teaching Cowper-Temple religion. Neither in the Act of 1870 nor in that of 1902 did religious teaching of any kind form part of the idea of a "public elementary school." The obligations in this respect of the new authority are precisely the same as those of the school boards. In neither case was there a duty in provided schools to teach any kind of religion, and in both there was the duty to "maintain and keep efficient" public elementary schools. The newly constituted bodies were to have the same powers and duties as the

(1) [1901] 1 K. B. 726. (2) [1902] 2 Ch. 768.

school boards. The responsibility and control were expressly restricted to secular instruction. These words were correlative and co-extensive. In like manner "maintain and keep efficient" must be construed. The words cannot be separated and the efficiency restricted to secular subjects. If religion be included full control must be given, including inspection. But inspection in religion has been expressly disallowed both by the Act of 1870 and that of 1902. The object of both Acts was the same, viz., to assist voluntary schools; but in both cases what was not expressly imposed on the education authority was left to the voluntary or denominational body. The maintenance and efficiency must be confined to the obligatory subjects. In the absence of the clearest language it could not have been intended to place the burden of denominational teaching on the authority. Reading the Act as a whole, it is clear that there are purposes of a public elementary school for which the local authority is not to be responsible; and these can only be the religious teaching. There was no need of an apportionment between secular and religious education, as the authority only had the control of the secular part, and were only, therefore, bound to pay for such portion. It cannot be that the Legislature, by the use of the single word "maintain," which might well bear more than one meaning, intended for the first time to lay a wholly new obligation upon the ratepayers.

Sir J. Lawson Walton, A.-G., in reply.

Sir R. Finlay, K.C., Rawlinson, K.C., and *Edwardes Jones*, for the appellant Grenside, whose appeal raised the same points, were not heard.

The House took time for consideration.

Dec. 14. LORD LOREBURN L.C. My Lords, the question raised in this appeal is whether or not the county council of the West Riding as local education authority is obliged by the Education Act, 1902, to find money out of the rates in order to defray the cost of giving denominational religious instruction in four public elementary schools, three of which happen to be Anglican and one Roman Catholic.

Our answer to that question must depend upon the construction

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of the Act. We have nothing to do with policy or with any unexpressed intentions of Parliament. Our duty is simply to ascertain the meaning of the Act as it stands.

When Parliament set itself in 1902 to the task of amending the law, elementary education in England and Wales was conducted under the Education Act, 1870, and the Code thereby authorized. There were schools not provided by the school boards, which I will call voluntary schools. There were also schools provided by the boards, which I will call board schools. Both were supported by parliamentary grants, provided they fulfilled certain conditions relating, among other things, to secular education. But no grant could be made for any kind of religious instruction.

In voluntary schools, if religion was taught, as it always was, it might be of any creed the managers pleased, subject to a stringent conscience clause; and they had to pay for it from private sources or from fees. In board schools religion might or might not be taught, as the school board thought proper, and paid for out of the rates, but if taught, it could not comprise any religious catechism or religious formulary distinctive of any particular denomination. In short, voluntary schools might teach what religion they pleased and pay for it themselves. Board schools could only teach undenominational religion, and might pay for it out of the rates. But no school was obliged to teach any religion at all, although almost all did.

Being without aid from the rates, the voluntary schools found themselves unable to supply from private sources the funds needed over and above the parliamentary grant for carrying on their work. The Act of 1902 thereupon enacted that they, as well as the board schools, should thenceforth be supported by rates as well as by grants. And the point now raised is, does that support extend to religious teaching, or is it confined to secular teaching, which alone is by statute obligatory on any school?

The Act of 1902 places voluntary schools and board schools alike under a new local education authority (in counties the county council), but with some differences.

The new authority steps into the place of the old school board

as regards board schools, and merely inherits the powers of its predecessor.

But as to voluntary schools, the Act divides educational control, and also divides the financial burden between the new authority and a body of managers which it establishes. In such schools the local education authority is to control all secular education. The managers are to control any religious instruction. They are not required by the Act to give it, but where they do they must give it in accordance with the trust deeds of the school, if such there be.

Again, as to expenditure, some items, such as repair and improvement, fall on the managers; some, such as wear and tear, fall on the local education authority. But this enumeration of expenses is not complete, and nothing is said as to the cost of religious instruction in particular.

I do not find anything else in the Act to help us in construing the crucial words of s. 7, which run as follows: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary."

Now the obligation to "keep efficient" cannot include an obligation to pay for religious instruction. For it means that the school is to be kept in a position to earn the parliamentary grant, and that can be earned without the giving of any religious instruction at all. Does the obligation to "maintain" impose a duty to pay for religious instruction? Really that is the whole question in this case. In the end all turns on the effect of one solitary word.

On this two views may be held. One is that when the local education authority is bidden to maintain a public elementary school it is not bound to do more than pay for all that the law requires to be provided in such a school. If that be the true construction, then the local education authority is not bound to pay for religious instruction, for the law does not require it to be provided.

The other view is that, in order to maintain a school, in which the law allows the managers to make religious instruction a part of the curriculum, the local education authority must take the school as it is, and bear the cost of the whole. If so, the county

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council of the West Riding must pay for religious instruction in these schools.

I have, not without anxiety, because of the eminent authority of the Master of the Rolls and Farwell L.J., come to the conclusion that the latter, and not the former, is the sound view. When an education authority is directed by an Act to maintain schools which may or may not give religious instruction, the preferable meaning is that it must maintain them as they are, not as they might be. When I find that, apart from the particular items of expenditure which are scrupulously apportioned between the local education authority and the managers, the only words imposing a duty to pay anything further saddle that duty on the local education authority, I take this as an indication that in all other particulars beyond these specified the sole paymaster is the local authority. But what finally determines me is the following consideration: The duty to "maintain" is not confined to voluntary schools, for the section applies to board schools as well. Now in the case of board schools, if religious instruction is given, indisputably it must be paid for by the local education authority out of the rates. And it must be so paid for because of the obligation to "maintain" the school, whether that obligation be sought in s. 18 of the Act of 1870 or in s. 7 of the Act of 1902. I cannot think that this word means one thing in case of voluntary schools and a different thing in case of board schools. For religious instruction is optional in both classes of school, though the option be exercised by different persons. And if it is covered by the word "maintain" in the one it must be so covered in the other also.

Accordingly I am of opinion that this appeal must be allowed.

I will only add two observations, in order to prevent misunderstanding. I do not think the local education authority has anything to do with the efficiency of the religious instruction given in schools, for the words "keep efficient" relate only to secular subjects. And I am satisfied that the managers cannot, as was suggested, spend what they please on religious instruction, and require the local education authority to pay the bill, whatever it may be. For the latter have the control of the

expenditure for this purpose, subject to the arbitrament of the Board of Education.

My noble and learned friend Lord James of Hereford, who is unable to be present, desires me to say that he agrees with the opinion I have just expressed to the House.

My noble and learned friend Lord Halsbury also desires me to say that he is of opinion that this appeal must be allowed.

LORD ASHBOURNE. My Lords, I concur in the judgment of the Lord Chancellor.

LORD MACNAGHTEN. My Lords, I also concur in the judgment of the Lord Chancellor.

LORD DAVEY. My Lords, I never differ from the Master of the Rolls or Farwell L.J. without grave hesitation. And it is only out of respect for those learned judges that I venture to trouble your Lordships with my reasons for thinking that the appeal should be allowed.

My Lords, it appears to me that the arguments of the respondents, though put in various ways and stated with great ingenuity and ability, all come back to the same point. And that point is that religious instruction is not an obligatory part of the curriculum of any public elementary school under the Act of 1870, and that the giving of such religious instruction is not one of the essential features of such a school laid down in the 7th section of that Act. Therefore, it is argued, the local authority can maintain a school as a public elementary school without paying for religious teaching, and will fulfil its statutory obligation under s. 7 of the Act of 1902, notwithstanding its omission to do so. This general argument was illustrated and enforced by reference to the 5th section and other sections of the Act of 1902.

It was, however, conceded that in all public elementary schools, whether provided or non-provided, religious instruction may lawfully be given, subject in the former case to the restrictions imposed by s. 14 of the Act of 1870. And in s. 7, sub-s. 2, of the Act of 1870 it is expressly contemplated that such instruction may form part of the regular school curriculum. It becomes,

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therefore, important to examine a little more closely what is the exact statutory obligation imposed on the local authority by s. 7 of the Act of 1902. The local authority is to maintain and keep efficient "all public elementary schools within their area which are necessary." This section does not relate to the provision of schools. It deals only with the maintenance of schools already provided either by the local authority itself or from some external source. The direction is not merely to pay the expenses of the instruction given in the school or any part of it, but it is to maintain the school such as it is with all its staff of teachers, apparatus and appliances, and the local authority is to have "the control of all expenditure required for that purpose, other than expenditure for which under this Act provision is to be made by the managers." You must, therefore, find something within the four corners of the Act which limits the generality of this obligation.

It was said that the words "maintain and keep efficient" are the same words as are used in the Act of 1870, s. 18, for describing the duty of the school board as regards a provided school, and that under that section the school board was not under an obligation to maintain religious teaching in the board schools. The obligation of the local authority as the successor and legatee of the powers of the defunct school board is no larger as regards provided schools than that of its predecessor, and as the same words are applied to provided and non-provided schools alike in s. 7 of the Act of 1902, they ought, it was said, to receive the same construction as regards each class of school. The argument seems to me a play upon words. The local authority, like its predecessor, is under no obligation to provide religious instruction in provided schools, but if it thinks fit to provide such instruction it comes under an obligation to maintain it. In the same way, if the managers think fit, as they lawfully may, to provide religious teaching in non-provided schools, the local authority must maintain it, unless there be something in the Act to throw the expenditure so incurred on the managers. The argument is really one in favour of the appellants.

Lastly, it was said that the duty is not only to maintain, but

also to "keep efficient," and that these latter words connote control over the subject, and thereby the generality of the word "maintain" is qualified and restricted. I think it was this argument which weighed chiefly with the learned judges in the Court of Appeal. How, it was said, can they keep the school efficient as regards a part of the instruction provided, over which they are not given any effective powers of control? Reference was made to s. 5, and to sub-s. 1 (*a*) and (*c*), and sub-s. 6 of s. 7, and to other sections of less importance, and contrast was drawn between the very full powers of control and enforcing efficiency conferred on the local authority as regards secular instruction, and the absence, or rather negation, of such powers in the case of religious instruction.

It is, no doubt, unusual for Parliament to impose a duty on a public body to provide out of public moneys for expenditure on objects which are not under its control. On the other hand, I am not prepared to say that the duty to pay is necessarily commensurate with the power of control over the application of the moneys paid, or that there is any such necessary connection between payment and control as will raise an implication in the absence of any express direction to that effect, that it was the intention of Parliament to relieve the local authority from the expense of providing religious instruction and throw it upon the managers. I think that the words of the Act mean no more than "maintain in a state of efficiency." I would, therefore, paraphrase s. 7 by saying that it is the duty of the local authority to provide for such expenditure as is reasonably necessary to maintain in a state of efficiency the school and all the instruction lawfully given in it, exclusive of any expenditure for which, under the Act, provision is to be made by the managers, and subject as to non-provided schools to certain conditions. But the obligation is, in my opinion, limited to what is reasonably necessary for that purpose, and the amount of the expenditure is under the control of the authority, with a reference in case of difference to the Board of Education. I cannot, however, find in the Act any direction or necessary implication that the managers are intended to bear the expenses of giving religious instruction in non-provided schools.

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The point on which I differ from the Master of the Rolls may be illustrated by quoting a few words from his judgment. The learned judge says: "If a duty is imposed it embraces control over the instruction given, as well as liability to make good the cost. The subject must be one in respect of which they are placed in a condition equally to perform both duties; they cannot be deemed liable to maintain in the sense of paying the cost unless they are also in a position to secure efficiency by exercising control. So far there would seem to be no room for difference of opinion." I cannot agree with the learned judge. It is, as I have already said, unusual, but it is not impossible for Parliament to sever the duty of paying the cost from that of exercising control. The same learned judge also thought that it could be shewn to demonstration that in s. 18 of the Act of 1870 "efficient" meant that the school should be kept up to such a standard as would entitle it to claim the parliamentary grant. It, no doubt, includes that, but the learned judge omitted to observe that the only power for the school boards to provide and pay for religious instruction (which they undoubtedly could do, and did, subject to the provision in s. 14) is to be found in the direction to "maintain and keep efficient." Your Lordships, however, have to construe the Act of 1902, and not that of 1870.

Farwell L.J. thought it plain that the words "for those purposes of a public elementary school for which provision is to be made by the local education authority" in s. 13, relating to endowments, mean "secular purposes." On what grounds the learned judge formed that opinion, which looks very like a petitio principii, I do not know. There are other matters, such as the keeping of the schoolhouse in good repair, and making alterations and improvements in the buildings, the expenditure on which is thrown by the Act on the managers of non-provided schools, and the charitable objects of the endowments might well include those, or some other educational or, perhaps, some non-educational purposes.

I am of opinion that the appeal should be allowed.

LORD ROBERTSON. My Lords, wide as has been the scope of the able and relevant argument which the House has heard, the

question to be determined is, What is the meaning of the following words: "The local education authority shall maintain" "all public elementary schools within their area"? The four schools named in the application are public elementary schools within the respondents' area, the sums in dispute are part of the cost of keeping those schools going. The point of objection is that those sums represent the cost of religious instruction in non-provided schools. The question is, therefore, Is the obligation on the local authority to "maintain" schools limited, in the case of non-provided schools, to the cost of secular instruction?

I shall state in a few highly condensed sentences the grounds which I find decisive of this question. My judgment was in suspense during the elaborat arguments; but my decision is clear and unhesitating.

Prima facie, the words of the statute are with the appellant. The objective of the word "maintain" is "school," and the obligation to maintain applies to each extant school, as if it were named. The argument of the respondents must modify either the verb "maintain" or the objective "school"; and, "maintain" being unequivocal, their operations are mainly directed to "school." It is proposed to substitute, as has been said, for these actual existing denominational schools at the places named, four notional but non-existent schools, limited to secular instruction. This may be right; but, as I have said, it requires to be made out.

Now the first and main argument in support of this view is, in my opinion, a mere and pure fallacy. It is said that the word "maintain" is coupled with the words "keep efficient," and that the two verbs, as they govern the same objective, must be co-extensive, and that the words "keep efficient" are certainly limited to secular instruction. Now I shall assume, for the sake of argument, that the words "keep efficient" do not apply to religious instruction, and are equivalent to "keep grant-earning." How does it follow that the coupled word "maintain" suffers a similar limitation? The limitation, be it observed, arises from the (assumed) meaning of the words "keep efficient," and the next question is, therefore, Is there any similar limitation in the

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word "maintain"? There certainly is not. This being so, the question stands thus: A school, on the assumption made about "keep efficient," has only a limited capacity of being kept efficient, i.e. this can only be in secular matters, but it is to be kept efficient to the full extent of its capacity in that regard. By parity of reasoning the school is to be maintained to the full extent of its capacity for maintenance, and, in this instance, there is no limit, for it uses and requires money for religious instruction as well as for secular instruction.

The question would have been exactly the same if the only grant in fact made had been by the Geographical Society instead of the State, and had been dedicated to teaching geography; then the respondents must have held that the obligation to maintain was also limited to teaching geography; or by the National Society, for teaching religion, and then, however painful it might be, their conclusion must have been that "maintain" applied only to religious instruction.

And now I come to what has not received quite the attention it deserves. The four schools in dispute are denominational schools; and religious instruction is an essential part of their organisms. Every word which I have said, and am going to say, is founded on the statute as distinguished from extraneous information; and it is a remarkable fact that before launching denominational schools as public elementary schools under this Act the Legislature looks them over (as it were) and actually screws up their orthodoxy to a legal standard. By s. 7, sub-s. 6, popularly known as the Kenyon-Slaney clause, "Religious instruction given in a" (non-provided) "public elementary school shall, as regards its character, be in accordance with the provisions, if any, of the trust deed relating thereto"; and the bishop is to decide disputed questions. Accordingly those schools (the schools in question) are recognized by the Act as what in fact they are, and religious instruction is treated as part of their function. It is thus plain on the face of the Act that, if you "maintain" a school of this kind, you maintain a school which teaches religion as part of the curriculum incumbent upon it to teach.

It has been said by one of the learned Lords Justices that

s. 5 is the keynote of the Act. I think that that section has a high importance, and is most significant in the present question. Sect. 5 states the scope of what I may call the educational activity of the local authorities, and in the case of non-provided schools limits their "superintendence" to secular instruction. The other region, that of religious instruction, is left where it was, in non-provided schools, with the managers, although even here, be it observed, a link is set up between local authority and managers, for two new managers are to be appointed by the local authority. Sect. 5, while it treats of superintendence, does not treat of maintenance, and it is by comparing s. 7 with s. 5 that the intentional latitude of s. 7 comes out most clearly. If it had been intended to make maintenance and superintendence co-extensive, how is it that the plain words "secular instruction," used only two sections back, are not used in s. 7, but, instead, the universal word "school," which, in its natural sense, includes the whole scope of its action regularized by this Act? And the choice of this comprehensive term is still further proved to be intentional by sub-s. (*a*), where the limited term and subject "secular instruction" is again expressed.

I have discussed the question hitherto on grounds within the four corners of the Act of 1902. It seems to me, however, that the limited construction proposed to be assigned to the phraseology in dispute is finally negatived by reference to the Act of 1870. The identical words in dispute occur in, and are evidently taken from, the 18th section of the Act of 1870. Now it is past all doubt that in s. 18 of the Act of 1870 they are not confined to secular instruction. I speak thus absolutely, because s. 14 of the Act of 1870 (the Cowper-Temple clause) cannot be read otherwise than as implying that it is competent to the school boards to teach religion. The plain meaning of the section is "You may teach any religion you like so long as you don't teach denominational catechisms or formularies."

It results that in "maintaining" under s. 18 of the Act of 1870 a board school in which Cowper-Temple teaching was taught, and paying for (inter alia) that religious instruction, a school board was doing right, and it was doing exactly what is now objected

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to, viz., it was paying for religious instruction. For be it observed that the point of the respondents' objection is not that the teaching is denominational, but that it is religious; the whole chain of the respondents' argument—that such teaching is not compulsory, is not inspected, does not earn grants—all applies to Cowper-Temple teaching, just as much as to denominational teaching.

On these grounds I am for allowing the appeal.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgments which have just been delivered by my noble and learned friends the Lord Chancellor and Lord Robertson, and I agree with both.

Order of the Court of Appeal reversed, and order of the King's Bench Division restored.

Lords' Journals, December 14, 1906.

Solicitors: *Treasury Solicitor; Clements, Williams & Co., for Trevor Edwards, Wakefield; Crawley Arnold & Co., for Barr, Nelson & Co., Leeds.*

[HOUSE OF LORDS.]

BOYLE OR WALSH . . . . . APPELLANT;

AND

WILSON AND OTHERS . . . . . RESPONDENTS.

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Licensing Acts—Refusal to renew Certificate—Evidence on which Magistrates entitled to Act—Absolute Discretion of Magistrates—Licensing (Scotland) Act, 1903 (3 *Edw.* 7, *c.* 25), *ss.* 11, 19, 20, 103.

The pursuer, a widow, by her condescendence averred that she was possessed of a house which had been licensed for fifty years; that in 1904 she applied to the licensing court under the Licensing (Scotland) Act, 1903, for renewal of her licence, that no complaint of the management or sanitary condition of the premises was ever made, nor any notice of objection given at any time prior to April, 1904; but at the licensing court on that date an inspector of police objected to the renewal on the ground that the premises were insanitary and the district congested; that he was not put on oath, nor was any evidence given as to either objection; that the pursuer through her agent offered to carry out any recommendation in regard to sanitary arrangements of the premises, but the court thereupon, without calling any evidence, refused to renew the certificate on the ground that the premises were insanitary and the district congested. She further averred that the licensing authority had prejudiced the question by having come to a resolution previous to the sitting of the court to reduce the number of licensed premises; and that an appeal to the licensing court of appeal was overruled by the same preconceived determination, and that no evidence was heard by the said court. She brought her action against the licensing authorities and town clerk of the burgh and the members of the licensing appeal court for non-performance of their duty:—

Held (affirming the decision of the First Division of the Court of Session), that the discretion of the licensing authority was absolute when exercised within the limits of its statutory authority, and that the pursuer's averments set out no case of ignorance, prejudice or bias, or refusal to give the hearing prescribed by the Act of 1903; secondly, that the licensing court of appeal could give its decision without the appearance of any objector or evidence.

Lundie v. *Magistrates of Falkirk*, (1890) 18 R. 60, affirmed.

APPEAL from interlocutors of the Lord Ordinary and of the First Division of the Court of Session. (1)

The appellant Mrs. Agnes Boyle or Walsh, a widow, held prior to 1904 a certificate for a public-house in the burgh of

(1) (1905) 7 F. 1009.

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Pollokshaws, Renfrewshire, and she raised this action against, first, the respondents the provost and magistrates of Pollokshaws, licensing authorities of the burgh under the Licensing (Scotland) Act, 1903 (3 Edw. 7, c 25); and secondly, against the town clerk of the said burgh; and thirdly, against the respondents the members of the licensing appeal court for the burgh of Pollokshaws and county of Renfrewshire, who sat on May 5, 1904. By the action the appellant sought reduction of certain deliverances or judgments pronounced by the respondents, first and third called, by which they refused her application for a renewal of her public-house certificate; and for a declaration that the magistrates of the burgh were under the duty "to hear and determine judicially the cause or matter raised by the appellant's application for renewal"; that they had failed to perform their duty; and that the appellant was entitled to decree for specific performance of their said duty. And, secondly, that the magistrates should be ordained by decree to hold an open court or meeting to determine the matter raised by the appellant's application for renewal for the year from Whit Sunday, 1904, or otherwise; that the second respondent ought to be ordained to make out a public-house certificate for the year from Whit Sunday, 1904.

In article 4 of her condescendence the appellant stated: "At the licensing court on April 12, 1904, applications were made for the renewal of thirty-five public-house certificates in the burgh. The magistrates dealt with various of these applications in four groups. The first group consisted of six applications, the second group consisted of ten, the third five, and the fourth of eight applications. The remainder of the thirty-five were treated separately. The appellant's application was in the third group of five. These were first all called together. Each of the applicants was then heard separately. When the appellant's agent moved for the renewal, Inspector Alexander Geddes verbally objected to the renewal on the ground that the premises were insanitary and the district congested. He did not, in stating the objections, give any explanation as to the alleged insanitary condition, and as to in what respect it consisted, but merely stated the pro forma objection; nor did he give any

explanation as to the alleged congested condition of the district, and no questions were asked on these points by the magistrates. The procurator fiscal for the burgh was present but did not object. The said Alexander Geddes was not put on oath and did not further explain in what respect the premises were insanitary, and no evidence was led in support of either of said objections. After Inspector Geddes had verbally intimated his said objections, the appellant's agent in respect of the powers of the licensing court under the Act of 1903, s. 42, sub-s. 3, informed the court that the appellant would undertake, if her application were granted, to carry out any recommendation the court might make in regard to sanitary arrangements of the premises, but his offer was disregarded. In point of fact, as the court knew nothing about the sanitary condition of the premises and made no enquiry, they could make no recommendation. After hearing the agent for the appellant the members of the court without calling for evidence retired to consider the appellant's application, along with the four applications in the same group by other persons for renewal of certificates for other premises, and on returning the provost intimated that the court refused two of the applications, including the appellant's, on the ground that the premises were insanitary and the district congested. No indication whatever was given in what respect appellant's premises were insanitary."

To this the respondents answered (inter alia): "Admitted that when the appellant's agent moved for the renewal of her licence Inspector Alexander Geddes, acting on behalf of and as authorized in writing by the chief constable of Renfrewshire, read to the licensing court objections taken by the said chief constable to the granting of the said renewal." . . . . "The chief constable was unable to be present in person because five licensing courts were being held simultaneously in Renfrewshire on that date, and he was personally present at one of them other than Pollokshaws." The answer then set out that there were only two superintendents of police in Renfrewshire, and they also were personally present at other licensing courts; that the chief constable was entitled to make any objection either verbally or in writing against the renewal; that it was within the power of

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the magistrates to dispose of the said objections without hearing evidence; that the magistrates had visited before the date in question all the licensed premises in the burgh and were acquainted with the sanitary conditions of the appellant's premises; and that all the five premises in the said group were situated within a radius of fifty yards. Condescendence 5 averred: That the appellant's agent had been informed in court that the said Alexander Geddes was the acting superintendent of police for the district of which Pollokshaws was a part, and accordingly he did not object to Alexander Geddes being heard without notice in terms of s. 20 of the Act, but that it had been subsequently ascertained that Geddes was only an inspector of police who had no authority from the county council to act as superintendent; and that the magistrates had no power to hear him as he was not entitled to object without notice (see s. 19 of the Act). In condescendences 6 and 8 she alleged that the refusal to renew her certificate was in pursuance of a preconceived determination of the magistrates to reduce the number of certificates, and that the magistrates had before calling the applicants for renewal before them heard deputations from certain bodies opposed to the granting of any licences. Condescendence 10 stated: "The appellant duly appealed against the said respondent's refusal to renew her licence to the court of appeal for the burgh of Pollokshaws. The respondents third called, constituted the said court of appeal which sat on May 5, 1904. That appeal court, actuated by the same motives and in pursuance of the same preconceived determination, refused to reverse the deliverance or judgment wrongfully come to by the said magistrates. There was no appearance for any objector in the appeal, and no evidence of any kind or in support of any objection was heard or suggested." To this the respondents answered that the court of appeal had heard fully the counsel for the appellant, who founded on the same ground as now stated.

The Lord Ordinary (Lord Kyllachy) on December 24, 1904, pronounced the following interlocutor: "Find that apart from the appellant's averments in condescendence 4 relating to the alleged departure of the magistrates from the statutory enactments on receiving and entertaining an objection to the renewal

of the appellants' licence stated by Alexander Geddes therein designed, the appellant has stated no relevant case for the interference of the Court; therefore repel the appellant's pleas except so far as founded on said alleged illegal procedure; and in respect that the parties are at issue as to the facts regarding the said procedure and are agreed that the same must be ascertained by a proof before further answer allow to both parties a proof of their respective averments as to said matter as contained in condescendence 4."

The appellant reclaimed against that interlocutor, and maintained she was entitled to proof of her averments without the limitation imposed.

The Court of Session appointed the case to be re-argued before seven judges, and thereafter on July 19, 1905, in accordance with the judgment of the Lord President (Lord Dunedin) (1),

(1) The Lord President said: "As regards the first point—I mean the point of the difference of the two Acts (the Acts of 1862 and 1903)—there is no doubt one speciality in Lundie's case (18 R. 60) which does not apply to this. Lord President Inglis, who delivered the judgment of the Court in Lundie's case, says at one portion of his judgment (18 R. p. 65): 'When an appeal is given to a particular tribunal, that would in ordinary circumstances impliedly exclude any other appeal; but in the present case the statutes do not leave the matter there, for they provide not only that there shall be an appeal to quarter sessions, but by the 34th section of the Act, 25 & 26 Vict. c. 35'—that being the ruling licensing Act in this country at that date—'it is further provided that "no warrant, sentence, order, decree, judgment or decision made or given by any quarter sessions, sheriff, justice or justices of the peace, or magistrate, in any cause, prosecution or complaint, or in any other matter under the authority of these Acts shall be subject to reduction, ... or appeal, or any other form of review, ... on any ground or for any reason whatever, other than by this Act provided."' So that to a certain extent, no doubt, the Lord President in that case did go upon the finality clause, and he held that, as this was a judgment given by justices of the peace and quarter sessions, the finality clause applied. Now, that cannot be said of the present Act, because the finality clause in the present Act is in somewhat different terms. The finality clause of the present Act is embodied in s. 103, and it is this: 'No warrant, sentence, order, decree, judgment or decision made or given by any quarter sessions, sheriff, justice or justices of the peace, or magistrate in any cause, prosecution, or complaint, or in any other matter under the authority of this Act, shall be subject to reduction, suspension, or appeal, or any other form of review or stay of execution on any ground

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concurred in by the Lord Justice-Clerk, Lords Adam, M'Laren, Kinnear, Kincairney, and Stormonth Darling, affirmed the decision of the Lord Ordinary. (1)

The appeal was heard first on May 21, 1906, and re-argued by order of the House before a larger court on July 23 and 24.

Danckwerts, K.C., and *William Hunter, K.C.* (of the Scottish bar) (with them *Francis Watt*), for the appellant. By s. 11 of the Act of 1903 (2) it is not competent for a licensing court to

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or for any reason whatever, other than by this Act provided.' Now, my Lords, it is clear on the construction of that section that that applies to matters such as prosecutions, and that it does not apply to decisions given by a licensing court, because a licensing court is a specially constituted court under the Act, and does not come under the nomenclature of quarter sessions, sheriff or justice of the peace, or magistrates, and accordingly the pursuer is probably entitled to say that, in so far as Lord President Inglis's judgment in Lundie's case rested on the finality clause, she has been able to make good a distinction between the state of the law as it existed then and the state of the law as it exists now. But that, I think, is all that can be said upon the differences between the two cases. As your Lordships know, the recent Act made no difference, on what may be called the general scheme of licensing, from the old law. It altered the tribunal, making a specially constituted tribunal, instead of justices of the peace in counties and magistrates in cities, which was the old tribunal, and it constituted a new appeal court; but it left the general scheme of the law as to the granting of licences, and in particular it left the whole question as to discretion precisely where it found it."

(1) 7 F. 1009.

(2) By 3 Edw. 7, c. 25, s. 11: "At any general half-yearly meeting of a licensing court . . . . it shall be lawful for the said court to grant certificates for the year." . . . . Provided always that all such meetings shall be held with open doors and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open court if such party shall think fit to attend."

Sect. 19: "Any person or the agent of any person owning or occupying property in the neighbourhood of the house or premises in respect of which any certificate or renewal of any certificate shall be applied for, may object to the granting or renewal of such certificate by lodging at any time, not less than five days before the general meeting of the licensing court, with the clerk to such court a notice in writing to that effect, signed by such person or his agent, specifying the grounds of such objection, which objection shall be heard at the then ensuing general meeting; and if such objection shall be considered of sufficient importance by the court in such general meeting, and shall be proved to their satisfaction, the said certificate shall not be granted or renewed: Provided always, that no such objection

refuse the renewal of any certificate without hearing the party in support of the application. This must be taken to mean that the decision of the court can only be given after a judicial hearing. By s. 19 the power to object to a renewal of a certificate is confined to a special class of persons, but the grounds of objection must be previously specified in writing and served on the person applying for a renewal, otherwise the objection is not to be entertained. By s. 20 the licensing court may hear and determine without notice certain objections, but the words "hear and determine" really mean "decide on substantial evidence." The court, in acting on the mere statement of an objection as it did in acting on Inspector Geddes's statement, was not "hearing and determining." The ground of objection must be established by evidence. Moreover, there was no allegation that Geddes stated at the time that he was acting for the superintendent of police. There is no express provision in the Act of 1903 similar to s. 42 of the English Licensing Act of 1872 (35 & 36 Vict. c. 94), which makes imperative the taking of evidence before refusal of an existing certificate. But it is a reasonable inference from the foregoing sections of the Scottish Act that the licensing court was not entitled to take away the appellant's existing certificate without any evidence having been led or without the alleged objections having been proved. The licensing court's refusal to renew without taking any evidence or giving the appellant the opportunity of carrying out any alteration in regard to sanitary arrangements was not a judicial proceeding: see Earl of Halsbury L.C. in *Sharp* v.

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shall be entertained unless it shall be proved or admitted that the person so objecting or his agent did, at least five days before such general meeting, deliver or cause to be delivered to the person applying for such certificate a copy of the aforesaid notice, or did forward to him by post, or did leave for him a copy thereof, addressed to him at his place of abode mentioned in his application, or in the case of an application for the renewal of any certificate at the licensed premises for which the application is made; . . . ."

Sect. 20: "It shall be lawful for the licensing court at any general meeting to hear and determine without the notice required by the immediately preceding section, any objections to be made verbally or in writing by any member of such court, or by the procurator fiscal, chief constable, or superintendent of police against the granting or renewing of any certificate."

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Wakefield (1) and the subsequent cases of *Evans* v. *Conway Justices* (2); *Reg.* v. *Merthyr Tydvil Justices* (3); *Raven* v. *Southampton Justices* (4); *Rex* v. *Howard* (5); *Rex* v. *Tolhurst* (6); and *Macbeth* v. *Ashley.* (7) The Court below proceeded on the authority of *Lundie* v. *Falkirk Magistrates* (8), but their Lordships did not correctly apply the judgment in that case. Here the magistrates had made up their minds to refuse some licences before hearing the applications, and were, therefore, biased in their judgment as to whether or not the appellant should be allowed a renewal of her licence.

Scott Dickson, K.C., and *R. L. Orr, K.C.* (both of the Scottish bar) (with them *Alex. Maconachie*), for the respondents. The magistrates acted within the powers and discretion given them by the Act. The appellant could have had evidence if she had asked for it. But the objection having been made by Geddes the appellant left the court without asking for a hearing. She admits that no request was made (condescendence 5), but contends that evidence ought to have been given. The hearing was in accordance with the practice of the licensing court. The new Act of 1903 created new licensing courts, but it re-enacted the old procedure. It in no way affected the general scheme of the licensing law previously in force, and in particular it in no way affected the absolute discretion vested in the licensing authorities. Sect. 11 of the Act of 1903 is an echo of s. 7 of the Act of 1828 (9 Geo. 4, c. 58). Sects. 18, 19, 20, 21 and 22 are merely repetitions of ss. 9, 11, 12, 27 of the Act of 1862 (25 & 26 Vict. c. 35), and s. 14 of the Act of 1828 respectively. The finality clause (s. 103) of the Act of 1903 (9) is in the same terms as s. 34 of the Act of 1862, and applies to the licensing court. *Lundie* v. *Falkirk Magistrates* (8), in 1890, was a case of renewal of an existing licence. There the objection was stated by the procurator fiscal, "That persons had been seen coming out of the pursuer's premises in a state of intoxication." The

(1) [1891] A. C. 173.
(2) [1900] 2 Q. B. 224.
(3) (1885) 14 Q. B. D. 584.
(4) [1904] 1 K. B. 430.
(5) [1902] 2 K. B. 363.
(6) [1905] 2 K. B. 478.
(7) (1874) L. R. 2 Sc. App. 352.
(8) 18 R. 60.
(9) See note, p. 49, ante.

pursuer there averred that if he had been heard, he had a good and sufficient answer. The Legislature in 1903 adopted the language of the old Acts, and this House has to construe the same statutory language as the Court construed in *Lundie's Case*. (1) It is impossible to make any point of distinction between that case and the present one. Justices at a licensing meeting are not a court. The Legislature called that meeting "court," just as bank meetings were called courts: see *Boulter* v. *Kent Justices* (2); *Rex* v. *Howard*. (3) There Collins M.R. said: "The key to the position appears to be that the justices in dealing with licences are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object and were constrained to sit by in silence although they had reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided."

In the Act of 1903 more weight was given to local and personal knowledge of local requirements. *Cameron* v. *Glasgow Magistrates* (4) decided that the magistrates had absolute discretion: see also *Bootland* v. *M'Farlane* (5); *Black* v. *Tennent* (6), where *Boulter* v. *Kent Justices* (2) was cited; and the early case of *Millar* v. *Campbell*. (7) The magistrates have heard and determined the appellant's application, and their hearing was final. If the magistrates hear and consider each application, it is no objection whatever to their proceedings or to their decision that they may hold the opinion that the area is over-licensed. The members of the court are chosen as being persons possessing local knowledge and entitled to use that knowledge.

W. Hunter, K.C., replied.

(1) 18 R. 60.
(2) [1897] A. C. 556, 566.
(3) [1902] 2 K. B. 363, 376.
(4) (1903) 5 F. 490.
(5) (1900) 2 F. 1014.
(6) (1899) 1 F. 423.
(7) (1849) 11 D. 355.

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The House took time for consideration.

1906. Dec. 3. LORD LOREBURN L.C. My Lords, on April 12, 1904, the pursuer, Mrs. Walsh, who held a public-house certificate in respect of 81, King Street, Pollokshaws, was deprived thereof by a refusal to renew it on the part of the licensing court. In May, 1904, this refusal was confirmed by the licensing court of appeal. The licence appears to have been held for about fifty years prior to this refusal. Thereupon she brought this action against the magistrates and town clerk of Pollokshaws, and also against the members of the licensing appeal court and the clerk of the peace for the county of Renfrews, upon the ground that the refusal was unlawful. The facts, or alleged facts, on which she relies are as follows:—

No complaint of the management or objection to renewal was ever made, nor was any notice of objection given at any time prior to April, 1904; but at the licensing court on that date Inspector Geddes verbally objected to the renewal on the ground that the premises were insanitary and the district congested. He was not put on oath, nor were any explanations or evidence given as to either of the objections. The pursuer's agent offered to carry out any recommendation in regard to the sanitary arrangements, but the court made none, and the pursuer alleges that they knew nothing about the sanitary condition and made no inquiry. After hearing pursuer's agent, the court, without calling for evidence, refused her application for a renewal.

The pursuer alleges that Inspector Geddes was supposed by her agent at the time to be acting superintendent, and, therefore, his objection was admitted without demur, but that in fact he had no authority from the county council to act as superintendent. Further, she alleges that prior to the hearing the town clerk, on behalf of the magistrates, had by a circular notified their opinion that the number of licensed premises was excessive, and that the refusal was the result of a preconceived determination, and that they arranged for Inspector Geddes to make the objections which he made. Lastly, she charges that the defenders received shortly before April 12 deputations from local parties inimical to the granting of any public-house

licences, which, she says, was irregular, and biased the defenders against renewing the pursuer's licence, and that the renewal was refused in pursuance of the policy so arrived at by the magistrates and under the influence of parties outside the sphere of the licensing courts.

In regard to the court of appeal, pursuer states that the appeal was overruled because the court was actuated by the same motives and the same preconceived determination, though no one appeared for any objector and no evidence was heard, and no one did appear and bear evidence against the appeal.

Apart from the charges of ignorance, prejudice and bias against the two courts, I assume, in pursuer's favour, that the facts were as stated. I will deal with these charges later.

The Act of 1903, which governs this case, establishes new in place of the old licensing authorities, which is a substantial change, and styles them courts, which is simply a matter of terminology not affecting the law. But it in no way interferes with the discretion of the licensing authorities. Indeed, the sections operative on that point in the Act of 1903, namely, ss. 11, 18, 19, and 20, are either echoes or adaptations that do not alter the sense of corresponding sections in the earlier Acts, namely, s. 7 of the Act of 1828, and ss. 9, 11, and 12 of the Act of 1862 respectively. And the ruling decision of *Lundie* v. *Magistrates of Falkirk* (1), decided under the old Acts, applies equally to the new. It is difficult to imagine a stronger case than that. Lundie's application for renewal was refused on the evidence of constables, and on the knowledge of one of the justices. His case was that he could have explained, and offered to explain, that evidence in a sense favourable to himself by other witnesses whose evidence was not heard. And it was there averred that the hearing was a mere pretence, the decision against the pursuer having been arranged beforehand; and substantially all the complaints in regard to the hearing that have been advanced in the present case were advanced in that also. Yet the Inner House decided that there was nothing on record that could be made the subject of inquiry in the Court of Session, and

(1) 18 R. 60.

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dismissed the action. The Lord President, in *Lundie's Case* (1), said: "We are not entitled to touch a judgment of the justices or the quarter sessions, unless it can be shewn that these tribunals, or either of them, have exceeded their statutory jurisdiction." If there were a charge of actual corruption, or that the applicant had been refused the hearing prescribed by statute, then no doubt the Courts might interpose. Otherwise I am of opinion that the language of the Lord President covers the ground, and applies to the new licensing court and court of appeal as it did to the old licensing authorities.

I desire to add that though the finality clause (s. 103 of the Act of 1903) cannot be applied to the decisions of a licensing court or court of appeal, because, except in certain burghs, those courts may include persons who are not among the persons enumerated in that clause, yet the result is the same as if it could be applied. For I agree with Lord President Inglis that the appeal given to a particular tribunal (viz., the court of appeal) impliedly excludes any other appeal.

Applying that law, it follows that in this case the licensing court were not bound to put Inspector Geddes on oath, or to require from him or anyone else either explanation or evidence, or to make any recommendation as to the sanitary arrangements. Likewise, in the court of appeal there was no necessity for any appearance or any evidence. The court were entitled to reject the appeal without either one or the other, acting on their own knowledge or opinion.

The Lord Ordinary allowed proof upon the point whether Geddes had a locus standi to make objections or not. Your Lordships have not been asked to interfere with that allowance, and accordingly I abstain from expressing any opinion upon it.

As to the charges of ignorance, prejudice, and bias. The only facts alleged in support of these charges was that the magistrates had, before the court was held, formed and publicly declared their opinion that there were too many licensed houses, and had received deputations of persons hostile to any licences. They were entitled to do both these things. Their duty is in the main administrative. And in coming to an administrative conclusion

(1) 18 R. 60.

on questions of licensing policy they may use their own judgment and hear whom they please.

I think this appeal must be dismissed.

LORD DAVEY. My Lords, it is sufficient for me to say in this case that I have carefully considered the judgment delivered by the Lord President, and concurred in by his colleagues on the bench, by the light of the arguments addressed to us by the learned counsel for the appellant, and I see no reason to differ from that judgment. In particular I think that the licensing court was entitled to form the opinion, based on their local knowledge and inquiries, and (as they say) "after full consideration of all circumstances," that the number of licensed houses in the town was in excess of the reasonable requirements of the inhabitants. The appellant might, of course, shew that her house has supplied a want which would be unsatisfied if her licence was not renewed, or that on other grounds her licence ought to be renewed, but I doubt whether she was entitled to be heard on the general question of administrative policy.

I also think that the court was entitled in its discretion to entertain the objection (which must be assumed for the present purpose to have been made with proper authority) that the appellant's premises were in an insanitary condition without requiring the objection to be supported by evidence on oath. I think they were entitled to rely on their personal knowledge, and the circumstance (which impresses my mind strongly) that the appellant's agent does not appear to have traversed the allegation of fact but preferred to confine himself to offering to put the premises in a better condition. It is averred in the fourth condescendence that the appellant's agent was heard before the court retired to consider the appellant's application, but there is no averment that the appellant's agent offered to call evidence or was refused the opportunity of doing so, or that he even asked for particulars or controverted the fact alleged.

With regard to what has been called the finality clause (s. 103 of the Act of 1903), I agree with the Lord President that it applies to such matters as prosecutions, and decisions of magistrates sitting as such, and not to decisions of the specially

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constituted licensing courts. I observe that the statute is divided into parts. Part II. applies to the "powers, duties, and procedure of licensing and appeal courts." Sect. 103 is found, not in Part II. but in Part VI., relating to "legal proceedings," and I think it is the sounder construction to make it apply only to such decisions as are given under the authority of that part of the Act.

I agree that the appeal should be dismissed with costs.

My Lords, my noble and learned friend Lord Halsbury is not able to be present to-day, and has requested me to say that he concurs in the judgment I have just read.

LORD ROBERTSON. My Lords, I think the judgment ought to be affirmed.

LORD LOREBURN L.C. My Lords, I have been asked by my noble and learned friend Lord James of Hereford to say that he concurs in the conclusion at which your Lordships have arrived.

Ordered that the orders appealed from be affirmed, and that the appellant pay to the respondents the costs of the appeal.

Lords' Journals, December 3, 1906.

Agents for appellant: *Godden, Son, & Holme, for James Purves, S.S.C., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for Inglis, Orr & Bruce, W.S., Edinburgh*

[PRIVY COUNCIL.]

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HOME INSURANCE COMPANY OF NEW YORK . . . . . } PLAINTIFFS;

AND

VICTORIA-MONTREAL FIRE INSURANCE COMPANY . . . . . } DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Contract of Insurance—Limitation Clause imported from original Policy—Construction—Clause held to be unreasonable and inapplicable.

In a contract of re-insurance which was engrafted on an ordinary printed form of fire insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire:—

Held that, having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to re-insurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy where the assured can sue immediately on incurring loss; it cannot apply where the insured is unable to sue until the direct loss is ascertained between parties over whom he has no control.

APPEAL by special leave from a decree of the Supreme Court dismissing the appellant's action.

That action was based under the circumstances stated in their Lordships' judgment on a policy of re-insurance issued by the defendant company on December 29, 1899, by which it re-insured for the term of one year and to the extent of $10,000 the liability of the Home Insurance Company under policies issued through its railway department covering railway property situated in the United States of America, Canada and Mexico.

The fire occurred on April 26, 1900. The Canadian Railway Company were paid by their insurers, the Western Assurance Company, on March 16, 1901, after a lengthy inquiry. The appellants paid their proportion of loss on the following April 13. The respondents then denied the appellants' claim against them

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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in accordance with the limitation clause contained in the original policy, and alleged by them to be incorporated with and applicable to their policy of re-insurance.

The trial judge held that the clause was inapplicable to the contract of re-insurance sued upon. The Court of review unanimously confirmed this decision. The Supreme Court by a majority of three to two reversed this judgment, and held that the clause was applicable.

Taschereau C.J. held: "That such a limitation of action might occasionally under certain circumstances operate injuriously against the re-insured was a good reason not to stipulate it; not at all a reason for asking the Court to read it out of the contract. They cannot have intended to stipulate it, or it is by inadvertence that it is in the policy, they would argue. That may be, but they must be told that stipulations in a contract cannot be ignored simply because they lead to consequences that the parties did not contemplate. That is the law of Canada, whatever it may be in the foreign country whereto the respondents have had to look for decisions in support of their case."

Davies J. considered that the clause could not be reconciled with the general purport of the re-insurance agreement, but concluded, "I must only construe the contract with the clause in. Remaining there it can have but one meaning, and that is fatal to the maintenance of the action."

Lafleur, *K.C.*, and *H. J. Elliott*, for the appellants, contended that the construction so put by three judges out of nine who heard the case was not the construction which the parties intended. The printed clause relied on by the respondents is one of the clauses in a statutory form applicable only to the ordinary fire policy as originally granted, and does not apply to a contract of re-insurance. The contract of re-insurance on its true construction is subject to the conditions, mode of settlement, and other provisions adopted by the original insurer in dealing with persons or property insured. But the claim sued upon was not exigible till ten days after proofs of payment by the company re-insured had been presented to the re-insurer. Consequently prescription could only run from that date, and the

respondents could not plead that the claim was barred before its proportion of loss was payable or even ascertained. Moreover, it had to be ascertained between the insured and the original insurer, over whose proceedings the appellants could exercise no control, and who either by delay or disputes might postpone a settlement till after the limitation period calculated from the fire had elapsed.

Cripps, K.C., and *Colefax*, for the respondents, contended that the twelve months' limitation clause could not be read out of the contract. The whole agreement between the parties is contained in the policy and the typewritten rider, and the two must be read as a whole in order to ascertain the nature and scope of the agreement. The rider is not incompatible with, and does not modify, controvert or restrict, the provision of the limitation clause. The provision that loss, if any, is payable ten days after presentation of proof of payment does not affect the limitation of time within which an action may be brought. They referred to *Provincial Insurance Co.* v. *Ætna Insurance Co.* (1); *Cornell* v. *Liverpool and London Fire and Life Insurance Co.* (2); *Allen* v. *Merchants' Marine Assurance Co. of Canada* (3); *Prevost* v. *Scottish Union and National Insurance Co.* (4); *In re Eddystone Marine Insurance Co., Ex parte Western Insurance Co.* (5)

Counsel for the appellants were not heard in reply.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This appeal raises a question under a so-called re-insurance policy. The only point now open for consideration is whether, according to the true construction of the contract between the parties, the claim is or is not barred by time.

On April 26, 1900, a fire occurred in Ottawa, generally known as the Hull fire. It destroyed a good deal of property belonging to the Canadian Pacific Railway Company. The railway company

(1) (1858) 16 U. C. Rep. 135.

(2) (1869) 14 Low. Can. Jurist, 256.

(3) (1887) Montreal L. R. 3 Q. B. 293; affirmed in 15 Sup. Court Rep. 488.

(4) (1897) Les rapports Judiciaires de Québec, Cour Supérieure, vol. 14, p. 203.

(5) [1892] 2 Ch. 423.

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was insured by the Western Assurance Company of Canada. Twenty per cent. of the liability of the Western Assurance Company under their policy was insured by the Home Insurance Company of New York under a policy dated April 10, 1899. On December 29, 1899, the Home Insurance Company insured a portion of their liability to the Western Assurance Company with the Victoria-Montreal Fire Insurance Company.

In the case of the Victoria-Montreal Fire Insurance Company as well as in the case of the Home Insurance Company the insurance was effected by attaching to a printed form of fire insurance policy a typewritten slip or rider containing the special terms of the so-called re-insurance. The printed form (which was the standard fire insurance policy of the States of New York, New Jersey, Pennsylvania, and Connecticut) was not amended except by the insertion of the syllable "re" before the word "insure," thus substituting the expression "does re-insure" for "does insure." So amended, and being No. 16,186, it was expressed to be a re-insurance "against all direct loss or damage by fire, except as hereinafter provided to an amount not exceeding ten thousand and $\frac{00}{100}$ dollars to the following described property while located and contained as described herein and not elsewhere." Immediately after these words there follows the slip or rider. It is headed "Attached to and forming part of Policy No. 16,186. W. Morgan. RE-INSURANCE. HOME INSURANCE COMPANY OF NEW YORK."

It proceeds as follows:—

$10,000.00 "On the liability of the Home Insurance Company under policies issued through their Railway Department covering railway property situated in the United States, Canada, and Mexico."

Then comes a definition of railway property, followed by provisions to the effect that no claim could be made for loss under the policy unless the railway company suffered by one fire a loss exceeding $50,000, insured either with the Home Company direct or else with some other company, and a portion re-insured with the Home Company, nor unless the Home Company sustained a loss by or in consequence of any one fire in excess of $50,000, nor for a greater sum than $5,000 by or in consequence of any

one fire. Then, with some other provisions not material to the question now under consideration, there is a provision usual in contracts of re-insurance, leaving the adjustment of claims in the hands of the company by whom the original insurance was effected, and making the loss payable ten days after presentation of proof of payment. The policy was sealed at the end of the printed form, and the signatures of the president, general manager, and W. Morgan, the secretary, were attached.

Although all the terms of an ordinary fire insurance policy were thus apparently incorporated or included in the re-insurance policy, not one of those terms (laying aside for the moment the condition in question in this suit) seems to be applicable to the case of a policy by which the assured is insured, not against direct loss occasioned by fire, but against the liability, or a portion of the liability, undertaken by the original insurer or the insurer covering the original insurer's direct liability.

Among the separate stipulations or clauses, over twenty in number, in the printed form there is the following:

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire."

The action in the present case was not commenced within twelve months next after the fire.

It is not suggested on behalf of the respondents, who are now in liquidation, that it was obligatory upon the Home Insurance Company, or even possible for them, to comply with the requirements in the printed form described as "the foregoing requirements," but it is contended that the clause prescribing suits or actions after the expiration of one year is applicable, or at least not inapplicable, to the contract of re-insurance, and that the action must consequently fail.

The trial judge and the Court of review held the action maintainable. In the Supreme Court the learned judges were divided in opinion, and the judgment below was reversed, Girouard and Nesbitt JJ. dissenting.

It is no doubt possible to read the sentence prescribing suits and actions, divorced from its immediate context, into

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the contract of re-insurance. But it will be observed that the typewritten slip is complete in itself. It contains all that is required for a re-insurance contract. If the sentence in question be read into it, the printed form upon which the slip is engrafted will after all add nothing to the agreement but one unreasonable condition. The rest of the printed form is foreign to the purposes of a re-insurance contract, inconsistent with the special terms contained in the slip, and in some places in direct conflict with its provisions.

It will also be observed that the slip does specify a series of cases in which no claim can be made under the policy. It may fairly be presumed that if it had been in the minds of the parties to exclude claims for loss in any other case, that case would have been specified in the same connection. To specify there all cases but one, and to leave that one to be discovered in another part of the instrument among a multitude of irrelevant provisions, is (to say the least) somewhat misleading.

A clause prescribing legal proceedings after a limited period is a reasonable provision in a policy of insurance against direct loss to specific property. In such a case the insured is master of the situation. He can bring his action immediately. In a case of re-insurance against liability the insured is helpless. He cannot move until the direct loss is ascertained between parties over whom he has no control, and in proceedings in which he cannot intervene. If the respondents are right an honest claim might be defeated in such a case as this without any default or delay on the part of the insured owing to unavoidable difficulties or complications, or possibly in consequence of some dilatory proceeding prompted by the very person in whose favour time is running.

It is difficult to suppose that the contract of re-insurance was engrafted on an ordinary printed form of policy for any purpose beyond the purpose of indicating the origin of the direct liability on which the indirect liability, the subject of the re-insurance, would depend, and setting forth the conditions attached to it.

In the result their Lordships have come to the conclusion that according to the true construction of this instrument, so awkwardly patched and so carelessly put together, the condition

in question is not to be regarded as applying to the contract of re-insurance. To hold otherwise would, in their opinion, be to adhere to the letter without paying due attention to the spirit and intention of the contract.

The question does not seem to have been raised before this in Canada. In the United States, though the point has not been brought before the Supreme Court, the universally accepted opinion appears to be that a clause such as that in question in this case is not applicable to a re-insurance policy, and there are several decisions to that effect.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Supreme Court discharged with costs, and the judgment of the Court of review restored.

The respondents will pay the costs of the appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Wilkinson, Raikes & Son.*

[PRIVY COUNCIL.]

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GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL OF CANADA . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Statute 4 *Edw.* 7, *c.* 31—*Power of Dominion Parliament—B. N. A. Act*, 1867, *s.* 92, *sub-s.* 13.

Held, that the Dominion Parliament is competent to enact s. 1 of Canadian statute 4 Edw. 7, c. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion

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Parliament from the liability to pay damages for personal injury to their servants.

That section is intra vires the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under the British North America Act, 1867, s. 92, sub-s. 13, are the subject of provincial legislation.

APPEAL from a judgment of the Supreme Court given on May 15, 1905, in the matter of a reference by His Excellency the Governor-General in Council as to the competency of the Dominion Parliament to enact the provisions contained in s. 1 of 4 Edw. 7, c. 31, being "an Act to amend the Railway Act, 1903."

This Act dealt solely with railway companies within the jurisdiction or legislative power or control of Parliament. The provisions in question are to the effect stated in their Lordships' judgment.

The Supreme Court (Nesbitt J. dissenting) held that the section was within the competency of the Dominion Parliament, Nesbitt J. holding that the Act was ultra vires as one passed to interfere with contract rights, and that it had no real relation to the operation and management of railways.

Lafleur, K.C., contended that the Act was ultra vires, since the exclusive jurisdiction to enact laws in respect to "property and civil rights" is vested in the provincial Legislatures: see British North America Act, 1867, s. 91 and s. 92, sub-s. 13. The enactment in question is in no sense railway legislation, but assumes to regulate and control the power to enter into contracts covered by s. 92, sub-s. 13. It affects railways and their employees no doubt, but it does so in reference to matters exclusively within the ambit of provincial legislation. The mere fact that a company is incorporated by the Dominion does not empower the Dominion Parliament to trench upon provincial rights. He referred to s. 94 of the Act of 1867; *Cushing* v. *Dupuy* (1); *Tennant* v. *Union Bank of Canada* (2); *Attorney-General of Ontario* v. *Attorney-General for Canada* (3); *Hodge* v. *The Queen* (4); *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours.* (5)

(1) (1880) 5 App. Cas. 409.
(2) [1894] A. C. 31.
(3) [1894] A. C. 189.
(4) (1885) 9 App. Cas. 117.
(5) [1899] A. C. 367.

Sir E. Carson, K.C., and *Newcombe, K.C.*, for the respondent, contended that the subject of the Act in question was within the legislative authority of the Dominion Parliament: see s. 91, sub-s. 29, and s. 92 of the Act of 1867. That Parliament has the exclusive power of authorizing such railways as those in question, and has necessarily the power of prescribing the conditions on which the companies authorized to construct or operate them shall exercise the rights conferred on them. That Parliament has legislated for the purpose of relieving companies subject to its legislative authority of liability, and can equally legislate to impose liability. If the province has also the same power its legislation may be, and has been, superseded. They referred to s. 239 of the general Railway Act; *Cushing* v. *Dupuy* (1); *Tennant* v. *Union Bank of Canada.* (2)

Lafleur, K.C., replied.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in s. 1 of 4 Edw. 7, c. 31, of the Statutes of Canada. These provisions may be generally described as a prohibition against any "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and the Dominion Legislatures, the making of laws for through railways is entrusted to the Dominion.

The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under s. 92, sub-s. 13, of the British North America Act, appropriate to the province.

The construction of the provisions of the British North

(1) 5 App. Cas. 409. (2) [1894] A. C. 31.

J. C. 1906 GRAND TRUNK RAILWAY OF CANADA v. ATTORNEY-GENERAL OF CANADA.

America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894—viz., *Attorney-General of Ontario* v. *Attorney-General of Canada* (1) and *Tennant* v. *Union Bank of Canada* (2)—seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field isnot clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.

It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature —which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all intra familiam, than in the numerous cases which may be figured where the civil rights of outsiders may be affected As examples may be cited provisions relating to expropriation. of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

In the factum of the appellants it is (inter alia) set forth that the law in question might "Prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees, and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far-reaching statute."

This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But

(1) [1894] A. C. 189. (2) [1894] A. C. 31.

if the appellants' factum properly describes its scope, then it is indeed plain that it is properly ancillary to through railway legislation.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. There will be no order as to costs.

Solicitors for appellants: *Batten, Proffitt & Scott.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1906
July 17, 18; *Nov.* 2.

BROTHERS OF THE CHRISTIAN SCHOOLS AND OTHERS . . . . . } APPELLANTS;

AND

THE MINISTER OF EDUCATION FOR ONTARIO AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ontario Separate Schools Act, R. S. O., c. 294, s. 36—Construction—Qualified Teachers—Exemption from Examination.

Held, that by the true construction of the Ontario Separate Schools Act, R. S. O., 1897, c. 294, s. 36, those members of the appellant communities who became such after the passing of the British North America Act, 1867, are not eligible for employment as teachers in the Roman Catholic schools in the province of Ontario unless they have received certificates of qualification to teach in the public schools. The exemption from examination recognized by that section is limited to those who were members at the date of the Act of 1867.

APPEAL from a judgment of the Court of Appeal for Ontario (January 12, 1906), upon a reference by the Lieutenant-Governor in Council under the provisions of Revised Statutes of Ontario, 1897, c. 84. The question decided is as to the interpretation to be put upon s. 36 of the Ontario Separate Schools Act, R. S. O., 1897, c. 294, set out in their Lordships' judgment. Upon that interpretation depended the issue whether or not the members of the appellant communities (the Brothers of the Christian Schools and the Grey Nuns) who became members after the passing of

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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the British North America Act, 1867, but have not received certificates of qualification, are nevertheless to be considered qualified teachers for the purposes of the Separate Schools Act.

The judgment of the Court of Appeal was delivered by Moss C.J.O., and held that the concluding words of R. S. O., 1897, c. 294, s. 36, exempting from examination, as a pre-requisite to the obtaining of a certificate of qualification, those persons qualified by law as teachers, either in the province of Ontario or at the time of the passing of the British North America Act, in the province of Quebec, serve only to protect the rights of those persons, who, as individuals, at the date mentioned, were entitled to exemption from such examination.

Belcourt, K.C., for the appellants, contended that the section in question was not intended to deprive, and does not deprive, members of the appellant communities who have not received certificates of qualification of the right to be employed as teachers in the Roman Catholic separate schools within the province of Ontario. Those members are persons qualified by law as teachers under Con. St. L. C., 23 Vict. c. 15, s. 110 (10.), which exempts them from examination. This exemption was vested in all members of those communities and has never been taken away. The object of the legislation in part was to secure to Roman Catholics of the province of Ontario the right to have as qualified teachers in the Roman Catholic separate schools of that province the class of persons exempt from examination who were entitled to teach in the schools of the province of Quebec. The members of the appellant communities were always recognized as qualified teachers until the question was raised in *Grattan* v. *The Ottawa Separate School Trustees* (1), cited by the Court below.

Henderson, for the respondents, the Bi-Linguist Teachers' Association of Eastern Ontario, contended that the judgment appealed from was right. He referred to s. 110 (10.) of the Lower Canada statute cited on the other side, and to 26 Vict. c. 5 (Canada), s. 13, which is the section which appears in subsequent statutes, and is the equivalent of s. 36 now in question. He contended that "persons" meant individuals qualified to teach under

(1) (1904) 8 O. L. R. 135, and 9 O. L. R. 433.

one or other of the ante confederation statutes cited. Persons qualified by law means persons who hold certificates of qualification and those who before confederation were exempted from the necessity of qualification. It cannot be extended to include those who are not found in either category. He referred to Ontario Act 1 Edw. 7, c. 39, s. 2, sub-s. 1; *Lord Advocate for Scotland* v. *Hamilton* (1); *Pharmaceutical Society* v. *London and Provincial Supply Association.* (2)

W. D. Macpherson, for the Minister of Education, contended that "qualified" in s. 36 imports statutory qualification, and that "persons" must be limited to individuals who at the date of passing the Act of 1867 were exempt from examination. If it were extended to all who might afterwards become members of the appellant communities, the employment of qualified and duly certificated teachers might be entirely superseded. He cited *O'Shanassy* v. *Joachim* (3); *Guardians of St. Leonard's, Shoreditch* v. *Franklin* (4); *Curtis* v. *Old Monkland Conservative Association.* (5)

Belcourt, K.C., replied.

1906
Nov. 2.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the Court of Appeal for Ontario upon a reference of the Lieutenant-Governor in Council under the provisions of c. 84 of the Revised Statutes of Ontario, 1897.

The question submitted to the Court in substance was this: Are members of the two religious and educational communities known as "the Brothers of the Christian Schools" and "the Community General Hospital, Almshouse, and Seminary of Learning of the Sisters of Charity of Ottawa," commonly called "the Grey Nuns," who became members of those communities after the passing of the British North America Act, 1867, to be considered qualified teachers for the purposes of the Separate Schools Act, and therefore eligible for employment as teachers in the Roman Catholic separate schools within the province of

(1) (1852) 1 Macq. H. L. 46.
(2) (1880) 5 App. Cas. 857.
(3) (1876) 1 App. Cas. 82, 90.
(4) (1878) 3 C. P D. 377.
(5) [1906] A C. 86.

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Ontario when such members have not received certificates of qualification to teach in the public schools of the province?

The answer to this question depends upon the meaning and effect of the concluding words of s. 36 of the Ontario Separate Schools Act, R. S. O., 1897, c. 294. That section is in the following terms :—

"The teachers of a separate school under this Act shall be subject to the same examinations and receive their certificates of qualification in the same manner as public school teachers generally; but persons qualified by law as teachers either in the province of Ontario or at the time of the passing of the British North America Act, 1867 in the province of Quebec shall be considered qualified teachers for the purpose of this Act."

The Court of Appeal answered the question in the negative, holding that the concluding words of s. 36 of the Ontario Separate Schools Act served only to protect the rights of those persons who, as individuals, were at the date of the passing of the British North America Act, 1867, in the province of Quebec entitled to exemption from examination.

Their Lordships agree in the conclusion at which the Court of Appeal arrived, and are satisfied to adopt the reasons on which that conclusion is founded.

Their Lordships therefore will humbly advise His Majesty that the judgment of the Court of Appeal should be affirmed and the appeal dismissed. There will be no costs of the appeal.

Solicitors for appellants : *Harrison & Powell.*

Solicitor for Minister of Education : *S. V. Blake.*

Solicitors for other respondents : *Norton, Rose, Norton, Farish & Co.*

[PRIVY COUNCIL.]

PERRY . . . . . APPELLANT;

AND

CLISSOLD AND OTHERS . . . . . RESPONDENTS.

J. C.*
1906
Feb. 1, 2;
Dec. 14.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales Lands Acquisition Act (44 *Vict. No.* 16), *s.* 13—*Prima facie Case for Compensation—Rightful Owner unknown—Claim in Respect of a possessory Title.*

Land in New South Wales having been duly resumed by the Minister of Public Instruction, it appeared that at the date of resumption the rightful owner was unknown and out of possession, but that F. C. had ten years previously entered into possession thereof as vacant land, enclosed it by substantial fencing, and thenceforth up to the date of resumption held exclusive possession thereof without notice of any adverse claim, received rents and paid rates and taxes in respect of the said land, which stood in his name in the rate-books of the municipality:—

Held, that F. C. was not a mere trespasser, but had a possessory title, good at the date of resumption, against everyone but the rightful owner, and in course of becoming absolute as against him. Having been deprived of the land, he had a prima facie case for compensation within the meaning of s. 13 of the Act of 1880 (44 Vict. No. 16) which was not excluded by the circumstance that under the Public Works Act, 1900, the Minister had acquired the title of the rightful owner.

APPEAL by special leave from a judgment or order of the High Court (June 20, 1904), reversing a judgment of the majority of the Supreme Court of New South Wales (November 16, 1903).

The order of the High Court granted a mandamus to the appellant, as Minister of Public Instruction of New South Wales, to compel him to make a valuation of certain land resumed by the Crown in 1891 under the provisions of the Lands for Public Purposes Acquisition Act (44 Vict. No. 16) for the purposes of a claim by the respondents arising under the circumstances stated in the judgment of their Lordships.

By the law in force in New South Wales the Crown, for the carrying out by the State Government of public works (including public schools), may acquire land in either of two ways, viz.—

* *Present:* THE LORD CHANCELLOR, THE EARL OF HALSBURY, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, SIR FORD NORTH, and SIR ARTHUR WILSON.

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(1.) by resumption under the Act 44 Vict. No. 16 (1880), confirmed and adopted by an Act of 1888 (51 Vict. No. 37); or (2.) under provisions analogous to those of the English Lands Clauses Consolidation Act. By a Consolidation Act of 1900 (Public Works Act, 1900) the Acts of 1880 and 1888 have been repealed and their clauses reconstructed, but the land in question was acquired by resumption under the provisions of the Act 44 Vict. No. 16, which differs from the English Act.

The particulars of title given by the respondents were as follows: "The claimants are the executors of F. Clissold, who at the date of resumption was in possession as owner and in receipt of rents, and had a title thereto by possession." The statutory declarations shewed that F. Clissold had by himself or his tenants "squatted" thereon since 1881, i.e., had taken possession without title and fenced it, the land having been then and for many years previously open and vacant and without apparent owner.

A rule nisi for a mandamus as above was discharged by the Full Supreme Court of New South Wales (Stephen A.C.J. dissenting). The High Court allowed an appeal and made the rule nisi absolute. The reasons of the majority of the Supreme Court were to the effect that there was no prima facie case for compensation, since the respondents had shewn no title. They were only trespassers, and the appellant had obtained legal possession of the land under the Act before they had obtained a statutory title. *Paling's Case* (1) was a clear authority to that effect, Martin C.J. having expressed the ratio of that decision in these words: "It cannot be that the promoters of the Act ever contemplated such an absurdity as for a person deliberately to take a piece of land that did not belong to him and then ask for compensation."

The case was twice argued before their Lordships, on the first occasion upon December 18 and 19, 1905, before a Committee constituted as stated below. (2)

H. Terrell, K.C., and *Vaughan Hawkins*, for the appellant, contended that on the gazette notification of resumption the land in

(1) (1886) 3 N. S. W. W. N. 41.
(2) The Lord Chancellor, Lord Davey, Sir Ford North, and Sir A. Wilson.

question vested absolutely in the Crown under what was tantamount to express statutory conveyances of all legal and equitable estates therein. They referred to the Lands for Public Purposes Acquisition Act (44 Vict. No. 16), ss. 6, 8, 10—16. At the date of resumption F. Clissold had no completed title by possession or otherwise to the land, or to any estate or interest therein. Consequently he had no claim to compensation in respect thereof. At the expiration of twenty years from 1881 his title would have been absolute. Before the expiration of that period the possession could be terminated, and the growing title destroyed, by the act of the true owner, to whose rights and title the appellant had succeeded by force of the legislation: see especially ss. 37 and 39 of the Act of 1900, under which the Crown succeeded to the title of the true owner and could set it up against the respondents. F. Clissold had in truth taken possession of what did not belong to him, and could not claim compensation from the true owner or from the Crown, his assignee, though he was entitled to be protected as against all third parties, i.e., except the true owner and those claiming under him; and had, except as against them, an alienable interest, transmissible both by will and inheritance. The English cases cited were *Douglass* v. *London and North Western Ry. Co.* (1), *Re Evans* (2), *Ex parte Winder* (3), *Ex parte Chamberlain* (4), and *Gedye* v. *Commissioners of Her Majesty's Works and Public Buildings.* (5) The Colonial cases cited were *Re Paling* (6)—which, it was contended, was rightly decided, and ought not to be overruled—and *Re Loder, Ex parte Singleton.* (7) Reference was made to s. 55 of 44 Vict. No. 16, and to *Doe* v. *Barnard* (8); see also *Ex parte Freemen, &c., of Sunderland.* (9)

Levett, K.C., and *Alfred Adams*, for the respondents, contended that their claim disclosed a prima facie case for compensation within s. 13 of Act 44 Vict. No. 16 and s. 96 of the Act of 1900. F. Clissold was in actual possession of the land at the date of resumption, and by force of the Act—see especially s. 56 of the

(1) (1857) 3 K. & J. 173.
(2) (1873) 42 L. J. (Ch.) 357.
(3) (1877) 6 Ch. D. 696.
(4) (1880) 14 Ch. D. 323.
(5) [1891] 2 Ch. 630.
(6) 3 N. S. W. W. N. 41.
(7) (1898) 19 N. S. W. L. R. Cases in Eq. 41.
(8) (1849) 13 Q. B. 945.
(9) (1852) 1 Dr. 184.

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later Act, which is practically identical with s. 55 of the Railways Act, 1858, and s. 71 of the Public Works Act, 1888—the respondents were to be deemed to be lawfully entitled thereto until the contrary was shewn to the satisfaction of the Court. He had an estate and interest therein which were enforceable against everyone but a true owner who was unknown and could not be found, which he could enforce by ejectment and transmit to his successors. Reference was made to Preston on Abstracts (1824), vol. 2, p. 279, Seisin and Disseisin, and p. 388; Burton's Compendium of Real Property, p. 126, s. 363-6; Real Property Limitation Act (3 & 4 Will. 4, c. 27), s. 2; *Doe* v. *Hughes* (1); *Doe* v. *Jauncey* (2); *Doe* v. *Barnard* (3); *Asher* v. *Whitlock* (4); *Dalton* v. *Fitzgerald* (5); *Penny* v. *Penny* (6); *Solway Junction Ry. Co.* v. *Jackson* (7); Co. Litt. 238 (a). Reference was also made to s. 6 of 44 Vict. No. 16, and to s. 15, s. 23, sub-ss. 2 and 3, of an amending Act of 1881; *Re Evans* (8); *Ex parte Winder* (9); *Ex parte Chamberlain* (10); *Gedye* v. *Commissioners of Her Majesty's Works and Public Buildings* (11); *Re Paling* (12); *Robert Reid & Co.* v. *Minister for Public Works* (13); *Railton* v. *Wood* (14); *Rex* v. *Hungerford Market Co., Ex parte Gosling.* (15)

Terrell, K.C., replied.

At a later date their Lordships reported to His Majesty that the appeal should be dismissed.

1906 *Dec.* 14.

The reasons for the report were delivered by

LORD MACNAGHTEN. This was an appeal from a judgment of the High Court of Australia, dated June 20, 1904, reversing a judgment of the Supreme Court of New South Wales. It raised a question under the Lands for Public Purposes Acquisition Act, 1880 (44 Vict. No. 16), now superseded

(1) (1829) Moo. & Mal. 346.
(2) (1837) 8 Car. & P. 99.
(3) 13 Q. B. 952.
(4) (1865) L. R. 1 Q. B. 1.
(5) [1897] 2 Ch. 86.
(6) (1867) L. R. 5 Eq. 227.
(7) (1874) 1 Rettie, Sess. Cas. (4th series) 831.
(8) 42 L. J. Ch. 357.
(9) 6 Ch. D. 696.
(10) 14 Ch. D. 323.
(11) [1891] 2 Ch. 630.
(12) 3 N. S. W. W. N. 42.
(13) (1902) 2 N. S. W. State Rep. 405.
(14) (1890) 15 App. Cas. 363, 366.
(15) (1833) 4 B. & Ad. 596, 603.

by the Public Works Act, 1900, which consolidates the law on the subject.

The Act of 1880 in its preamble recites that it is expedient to make provision for the acquisition on behalf of the Crown of lands required for certain purposes, including, among others, "sites for public schools," and "to provide compensation for lands so acquired."

The following are the material provisions of the Act.

When the Governor sanctions the acquisition of any land for a school site he may, by notification in the Gazette, declare that such land, if private property, has been resumed for such purposes (s. 6).

Upon such publication the land is forthwith vested in the Minister of Public Instruction and his successors on behalf of the Crown, for the purposes of the Act, for an estate of inheritance in fee simple in possession freed and discharged from all other estates and interests (s. 8).

The owners of the land or the persons who, but for the provisions thereinbefore contained, would have been such owners are entitled to receive such sum of money by way of compensation for the land of which they have been deprived under the Act as may be agreed upon or otherwise ascertained under the provisions thereinafter contained (s. 10).

The estate and interest of every person entitled to land so resumed, or any portion thereof, and whether to the legal or equitable estate therein, is by virtue of the Act deemed to have been as fully and effectually conveyed to the Minister as if the same had been conveyed by means of the most perfect assurances in the law. Every such estate and interest upon the publication of such notification as aforesaid is taken to have been converted into a claim for compensation in pursuance of the provisions thereinafter contained, and every person upon asserting his claim as thereinafter provided, and making out his title in respect of any portion of the resumed land, is entitled to compensation on account of such resumption in manner thereinafter provided (s. 11).

Every person claiming compensation in respect of any land so resumed is, within ninety days from the publication of such

J. C. 1906 PERRY v. CLISSOLD.

notification or at any time afterwards, within such time as a judge of the Supreme Court appoints in that behalf, to serve a notice in writing upon the Minister and a like notice upon the Crown solicitor, "which notice," it is declared, "shall set forth the nature of the estate or interest of the claimant in such land together with an abstract of his title" (s. 12).

Sect. 13 is in the following terms: "Within sixty days after the receipt of every such notice of claim by the Crown solicitor he shall forward the same, together with his report thereon, to the Minister, who shall thereupon (unless no prima facie case for compensation shall have been disclosed) cause a valuation of the land or of the estate or interest of the claimant therein to be made in accordance with the provisions of this Act, and shall inform the claimant, as soon as practicable, of the amount of such valuation by notice in the form of the Second Schedule hereto."

By notification published in the Gazette of July 17, 1891, a piece of land containing two acres and three perches at Canterbury, in the county of Cumberland, was resumed for a public school site. The land was at the time in the possession of one Frederick Clissold. Notice of the resumption was given to Clissold on July 22, 1891; but nothing further was done then. Clissold died shortly afterwards, and his will was proved on May 5, 1892.

In May, 1902, under an order of the Supreme Court, the respondents, who are the present trustees of Clissold's will, and of whom three are his surviving executors, served notice of their claim to compensation in respect of the land resumed by the notification of July 17, 1891, stating that the claimants were the executors of Frederick Clissold, "who at the date of resumption was in possession of such land as the owner thereof, and in receipt of the rents of such lands, and had a title thereto by possession."

It appeared from the papers which were forwarded with the claim that in the year 1881 Frederick Clissold entered into possession of the land, which was then open and vacant, and enclosed it by a substantial fencing, and that ever since the enclosure, up to the time of resumption, Clissold held exclusive

possession of the land without notice of any adverse claim, and let it to different tenants and received the rents for his own use and benefit, and duly paid all rates and taxes in respect of the land which stood in his name in the rate-books of the municipality of Canterbury.

The Minister refused to entertain the claim to compensation.

The Supreme Court upheld the view of the Minister. The High Court reversed this decision, and granted a mandamus requiring the Minister to cause a valuation to be made.

The only question on this appeal was whether or not a prima facie case for compensation had been disclosed.

On the part of the Minister it was contended that, upon the plaintiffs' own showing, Clissold was a mere trespasser, without any estate or interest in the land.

Their Lordships are unable to agree with this contention.

It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.

On behalf of the Minister reliance was placed on the case of *Doe* v. *Barnard* (1), which seems to lay down this proposition, that if a person having only a possessory title to land be supplanted in the possession by another who has himself no better title, and afterwards brings an action to recover the land, he must fail in case he shews in the course of the proceedings that the title on which he seeks to recover was merely possessory. It is, however, difficult, if not impossible, to reconcile this case with the later case of *Asher* v. *Whitlock* (2), in which *Doe* v. *Barnard* (1) was cited. The judgment of Cockburn C.J. is clear on the point. The rest of the Court concurred, and it may be observed that one of the members of the Court in *Asher* v. *Whitlock* (2) (Lush J.) had been of counsel for the successful party in *Doe* v. *Barnard*. (1) . The conclusion at which the Court

(1) 13 Q. B. 945. (2) L. R. 1 Q. B. 1.

J. C. 1906 PERRY v. CLISSOLD.

arrived in *Doe* v. *Barnard* (1) is hardly consistent with the views of such eminent authorities on real property law as Mr. Preston and Mr. Joshua Williams. It is opposed to the opinions of modern text-writers of such weight and authority as Professor Maitland and Holmes J., of the Supreme Court of the United States. (2)

Their Lordships are of opinion that it is impossible to say that no prima facie case for compensation has been disclosed.

They do not think that a case for compensation is necessarily excluded by the circumstance that under the provisions of the Act of 1900 the Minister acquired not merely the title of the person in possession as owner, but also the title, whatever it may have been, of the rightful owner out of possession, who never came forward to claim the land or the compensation payable in respect of it, and who is, as the Chief Justice says, "unknown to this day."

The Act throughout from the very preamble has it apparently in contemplation that compensation would be payable to every person deprived of the land resumed for public purposes. It could hardly have been intended or contemplated that the Act should have the effect of shaking titles which but for the Act would have been secure, and would in process of time have become absolute and indisputable, or that the Governor, or responsible Ministers acting under his instructions, should take advantage of the infirmity of anybody's title in order to acquire his land for nothing. Even where the true owner, after diligent inquiry, cannot be found the Act contemplates payment of the compensation into Court to be dealt with by a Court of Equity.

It only remains for their Lordships to express their opinion that the valuation to be made should be a valuation of the land as at the date of the notification of resumption.

When the valuation is made it will be for the claimants to take such proceedings as they may be advised to recover the amount, unless the Minister thinks fit to pay them or to pay the money into Court.

(1) 13 Q. B. 945.

(2) Seearticles by Professor Maitland in the Law Quarterly Review, vols. 1, 2, and 4; Holmes, Common Law, p. 244; Prof. J. B. Ames in 3 Harv. Law Rev. 324, n.

For these reasons their Lordships humbly advised His Majesty that the appeal should be dismissed, and ordered the appellant to pay the costs of the appeal. J. C. 1906 PERRY v. CLISSOLD.

Solicitor for appellant: *G. M. Light.*
Solicitor for respondents: *G. Slade.*

[PRIVY COUNCIL.] J. C.*

WEBB . . . . . APPELLANT; 1906

AND *May* 18, 22, 24;

OUTRIM . . . . . RESPONDENT. *Dec.* 6.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

The Commonwealth of Australia Constitution Act (63 & 64 *Vict.* c. 12)—*Intervenant—Power of the Victorian Legislature* (18 & 19 *Vict.* c. 55)—*Validity of Income Tax imposed by a State on a Commonwealth Salary—Right of Appeal from Victorian Supreme Court.*

Held, that the respondent, an officer of the Australian Commonwealth, resident in Victoria and receiving his official salary in that State, is liable to be assessed in respect thereof for income tax imposed by an Act of the Victorian Legislature.

No restriction on the power of the Victorian Legislature in favour of such officer is expressly enacted by the Commonwealth Constitution Act, nor can one be implied on any recognized principle of interpretation applicable thereto.

Held further, that a petition by the Commonwealth for a dismissal on the ground of incompetency of an appeal from an order of the Supreme Court of Victoria upholding the assessment in question must be dismissed. The Constitution Act does not authorize the Commonwealth Parliament to take away the right of appeal to the King in Council existing in this case.

APPEAL from a judgment of the Supreme Court (February 10, 1905) given upon a special case referred by Hodges J. to the Full Court. It upheld the respondent's objection to being assessed to the Victorian State income tax in respect of his salary as a Federal official. The tax in dispute was assessed under the Victorian Income Tax Act, 1895 (No. 1374), and a subsequent

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* *Present:* THE EARL OF HALSBURY, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C. 1906 WEBB v. OUTRIM.

Income Tax Act of 1904 (No. 1938), and the regulations made thereunder, in respect of 900*l.* received by the respondent from the Commonwealth of Australia under Commonwealth Acts Nos. 14 of 1903 and 15 of 1904, as his official salary in respect of his Commonwealth office of deputy postmaster-general in the State of Victoria.

On March 29, 1905, Hodges J. granted leave to appeal to His Majesty in Council, holding that the Commonwealth Judiciary Act No. 6 of 1903, so far as it attempted to transfer any matter previously within the jurisdiction of a State Court to the category of Federal jurisdiction, was, notwithstanding s. 77, sub-ss. 2 and 3, of the Commonwealth Constitution Act (63 & 64 Vict. c. 12), ultra vires of the Federal Parliament, and that an appeal still lay in such matter to the Privy Council as of right. The Attorney-General for the Commonwealth therefore applied to His Majesty in Council by petition, in pursuance of leave to intervene previously granted, to dismiss as incompetent the said appeal. It was directed to stand over till the hearing of the appeal, as also was a petition by the appellant for special leave to appeal.

Cohen, K.C., and *Vaughan Hawkins*, for the intervenant, contended that the appeal does not lie in this case to His Majesty in Council, either as of right or of grace, and even if it did lie as of grace and by special leave, such leave ought not to be granted. Under the Constitution Act the High Court of Australia, and not His Majesty in Council, is to be the final arbiter to determine any question, however arising, as to the limits inter se of the constitutional powers of the Commonwealth and a State, unless the High Court certifies that for special reason the question ought to be determined by His Majesty in Council.

That High Court is created by s. 71 of the Commonwealth Constitution Act (63 & 64 Vict. c. 12). Its appellate jurisdiction is defined by s. 73. Its Federal jurisdiction as conferred by that Act is limited to the matters mentioned in s. 75; but the Federal Parliament is empowered thereby to make laws adding to those matters as provided by s. 76, sub-s. 1, and s. 77, sub-ss. 2 and 3. Then follow s. 74, on which this intervention

is based, and the Judiciary Act, 1903, which exercised the power of extending the matters which are subject to the Federal jurisdiction of the High Court: see ss. 30, 38, 39, sub-ss. 1 and 2. They referred also to s. 109 of the Constitution Act, which enacts that the law of the Federal Parliament is to prevail in case of a State law being inconsistent therewith, and to s. 114, by which a State cannot, without the consent of the Federal Parliament, impose any tax on property of any kind belonging to the Commonwealth.

They referred to *Wollaston's Case* (1), where it was held that a Federal officer's salary was taxable by the State. That case was not appealed from, but it was virtually overruled in *D'Emden* v. *Pedder* (2), where it was held on appeal from Tasmania that the principle of *McCulloch* v. *State of Maryland* (3) that a State could not interfere in any way with the Federal Government was embodied in the Australian Constitution. They also referred to *Deakin* v. *Webb* and *Lyne* v. *Webb* (4), which decided against the power of taxation contended for, the High Court refusing thereafter to grant a certificate under s. 74.

Wise (*K.C.* of New South Wales Bar), for the appellant, contended that the Supreme Court of Victoria had, at the date of passing the Judiciary Act of the Commonwealth (No. 6 of 1903), power to entertain this action. The appellant had a right of appeal from the decision of that Court, which right was in existence at the date of passing the Judiciary Act, and was not, on the true construction thereof, taken away. If s. 39 or any other section of that Act purports to limit the operation of the Orders in Council which regulate appeals to His Majesty in Council from the Supreme Court of Victoria, or to deprive a suitor in the said Court of any right conferred on him thereby, it is to that extent ultra vires of the Constitution. Besides, s. 39 has no application to this appeal, for a judgment of a Victorian Court on the liability of a Victorian taxpayer to pay in Victoria an income tax levied by the Parliament of Victoria is not "a matter arising under the Constitution or involving its

(1) (1902) 28 Vict. L. R. 357.
(2) (1904) 1 Commonwealth L. R. 91.
(3) (1819) 4 Wheat. 316.
(4) (1904) 1 Commonwealth L. R. 585, and at p. 621.

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interpretation" within the meaning of s. 30 of the Judiciary Act, and therefore does not fall within the purview of s. 39.

Cohen, K.C., replied.

Their Lordships intimated that they would hear the appeal, and give judgment on the preliminary objection in their judgment on the appeal.

Sir R. Finlay, K.C., and *Wise* (*K.C.* of New South Wales Bar), for the appellant the Victorian Commissioner of Taxes, contended that the order of the Supreme Court should be reversed and the respondent assessed to income tax as claimed. It was duly assessed under the Victorian Income Tax Acts of 1895 and 1896 and the Act declaring the rates of income tax for the year ending December 31, 1904. The respondent is a taxpayer within those Acts. The Constitution Act of the State of Victoria (18 & 19 Vict. c. 55), Sched. I., s. 1, confers on the Victorian Legislature plenary powers to tax all persons and property within the limits of the State, except such as are expressly excluded by s. 42 of Sched. I., which does not relate to either the respondent or his income. There is no provision in the Constitution Act of the Commonwealth exclusively vesting in its Parliament or withdrawing from the Victorian Parliament the power of taxing incomes earned within the State by persons resident within the State: see ss. 106, 107 and 108. The taxing power in question, therefore, continues unimpaired; and there is no power, express or implied, in the Commonwealth to limit its exercise. In *Deakin* v. *Webb* (1) the High Court applied to the construction of the Australian Constitution the doctrine of implied powers as laid down by Marshall C.J. in *McCulloch* v. *State of Maryland*. (2) But the Constitutions of the United States and Australia are not framed on parallel lines, and implied powers cannot be appealed to so as to limit the taxing power of the State, which is preserved unimpaired by the express sections of the Constitution Act. Any abuse by a State of its taxing powers in such way as would tend to destroy the efficiency of the Commonwealth can be controlled or prevented

(1) 1 Commonwealth L. R. 585, and at p. 621. (2) 4 Wheat. 316.

without the aid of implied powers. The royal prerogative can disallow an Act of the State Parliament, and large powers of amendment are conferred by s. 128 of the Constitution Act. The tax in question does not control or interfere with the free exercise of the legislative or executive authority of the Commonwealth. They referred to *Bank of Toronto* v. *Lambe*. (1)

The Victorian Legislature has full power within the scope of the authority conferred by its own Constitution and not withdrawn or impaired by the Commonwealth Constitution Act to impose the taxation impugned in this case. They referred to *Reg.* v. *Burah* (2); *Hodge* v. *Reg.* (3); *Powell* v. *Apollo Candle Co.* (4): and to cases relied on by the High Court in *Deakin* v. *Webb* (5); *McCulloch* v. *State of Maryland* (6); *Osborn* v. *U. S. Bank* (7); *Dobbins* v. *Commissioners of Erie County* (8); *Collector* v. *Day* (9); *Melcher* v. *City of Boston* (10); *Railroad Co.* v. *Peniston* (11); *Leprohon* v. *Ottawa* (12); *Thompson* v. *Pacific Railroad Co.* (13); *National Bank* v. *Commonwealth* (14); *Wollaston's Case* (15); *In re the Income Tax Act, Deakin's and Lyne's Cases* (16); *Municipal Council of Sydney* v. *The Commonwealth* (17); *L'Union St. Jacques de Montreal* v. *Bélisle*. (18)

Danckwerts, K.C., J. A. Hamilton, K.C., and *Simon*, for the respondent, contended that the respondent was a Commonwealth official, and his salary was unconditionally allotted to him by Commonwealth Appropriation Acts No. 14 of 1903 and No. 15 of 1904. Under these circumstances they contended that—(1.) the Victorian Income Tax Acts do not, according to their true

(1) (1887) 12 App. Cas. 575, 579, 585.
(2) (1878) 3 App. Cas. 889, 904, 905.
(3) (1883) 9 App. Cas. 117, 131, 132.
(4) (1885) 10 App. Cas. 282, 289, 290.
(5) 1 Commonwealth L. R. 585, 621.
(6) 4 Wheat. 316, 319, 426, 427, 439.
(7) (1824) 9 Wheat. 738.
(8) (1848) 16 Peters, 435, 476.
(9) (1870) 11 Wallace (U.S.), 113.
(10) (1845) 9 Metcalfe, 73, 75 (50 Massachusetts Rep.).
(11) (1873) 18 Wallace 5, 29.
(12) (1877) 40 Upper Can. 478, 499; on appeal, 2 Ont. A. C. 522.
(13) (1869) 9 Wallace, 579.
(14) 9 Wallace, 353, 361.
(15) 28 Vict. L. R. 357.
(16) (1904) 29 Vict. L. R. 748, 760.
(17) (1904) 1 Commonwealth L. R. 306.
(18) (1874) L. R. 6 P. C. 31, 36.

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construction, apply to his salary; (2.) the Victorian Legislature has no power to tax it. Income tax was introduced into Victoria in 1895 by Act No. 1374, which established the machinery for collecting it, declared the nature of the income on which the tax is payable, and provided a basis of assessment. The rate of the tax for the ensuing years was left to be determined by annual Acts, and No. 1938 of 1904 determined it for the year 1905. They referred to ss. 2, 5, 14, sub-ss. 1 and 3. Salaries of officials, it was contended, were not included in the Act, and special legislation was required to bring them within its provisions, the tax imposed being one on personal exertion. The words used were not intended to include persons in receipt of public salaries. They referred to the two cases of *Deakin* v. *Webb* and *Lyne* v. *Webb* (1), and submitted that they were binding. It was intended that questions affecting the rights of States inter se should be settled in the Colony. They referred to the Commonwealth Act, s. 73. The High Court in this matter was in the position of an arbitrator under the Constitution Act. They referred to *Dobbins* v. *Commissioners of Erie County* (2); *Collector* v. *Day*. (3)

With regard to the authority of Privy Council decisions, see *Martin* v. *Mackonochie* (4) and *Mackonochie* v. *Lord Penzance*. (5) The tax in this case was in effect a diminution attempted to be imposed by State legislation on the salary of a Commonwealth officer fixed by Commonwealth legislation. The State cannot limit the powers of the Commonwealth, for the Constitution Act does not authorize such limitation, either expressly or impliedly. It was contended that no previous legislation by a State contrary to the Constitution Act was valid unless expressly authorized or preserved, and that no subsequent legislation inconsistent with it was valid. They referred to *National Bank* v. *Commonwealth* (6); *Bank of Toronto* v. *Lambe* (7); *Coates* v. *Town of Moncton*. (8)

Sir R. Finlay, K.C., replied.

(1) 1 Commonwealth L. R. 585, 621.
(2) 16 Peters, 435, 476.
(3) 11 Wallace (U.S.), 113.
(4) (1879) 4 Q. B. D. 697, 713.
(5) (1881) 6 App. Cas. 424.
(6) 9 Wallace, 353.
(7) 12 App. Cas. 575, 587.
(8) (1886) 25 New Brunswick, 605.

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The judgment of their Lordships was delivered by

THE EARL OF HALSBURY. This is an appeal from an order of the Supreme Court of Victoria in the Commonwealth of Australia, in which the substantial question is whether the respondent, an officer of the Commonwealth, is liable to be assessed for income tax imposed by an Act of the Victorian Legislature in respect of his official salary, he being resident in Victoria and his salary being received by him in that State. By the Victoria Act (18 & 19 Vict. c. 55) it was enacted that there should be established in Victoria, instead of the Legislative Council then subsisting, one Legislative Council and one Legislative Assembly constituted as therein provided, and it was therein further enacted that Her Majesty should have power by and with the advice and consent of the Council and Assembly in question to make laws in and for Victoria in all cases whatsoever. And in the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12) it is further provided (s. 106) that: "The Constitution of each State of the Commonwealth shall subject to this Constitution continue as at the establishment of the Commonwealth . . . . until altered in accordance with the Constitution of the State."

Sect. 107 provides: "Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth . . . ."

No question arises either as to the general authority of the State of Victoria to impose taxation upon all who are within the ambit of its authority, nor do their Lordships understand that any question arises as to the legality of the tax in question other than the one question which has been argued before them. That question is, whether the power given in such wide words as have been mentioned above has been curtailed and so far restricted that, if a person be an officer of the Commonwealth, though he may be resident in Victoria and may have received his salary therein, he is not taxable in respect of such salary. It is not contended that this restriction on the powers of the Victoria Constitution is enacted by any express provision of the

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Commonwealth Act, but it is argued that, inasmuch as the imposition of an income tax might interfere with the free exercise of the legislative or executive power of the Commonwealth, such interference must be impliedly forbidden by the Constitution of the Commonwealth, although no such express prohibition can be found therein. In favour of this argument the main reliance is placed upon a judgment delivered by Marshall C.J. on an occasion when a similar question arose between the Federal authorities and one of the States of the American Union, *McCulloch* v. *State of Maryland*. (1) No one would speak lightly of the authority of such a judge as Marshall C.J., and, dealing with the same subject-matter as that to which that most learned and logical lawyer applied his observations, his judgment might well be accepted as conclusive. But, as Griffith C.J. himself points out, "we are not . . . . bound by the decisions of the Supreme Court of the United States," though, as the same learned judge says further on in the same case, *D'Emden* v. *Pedder* (2), those decisions may be regarded as "a most welcome aid and assistance" in any analogous case. But here the analogy fails in the very matter which is under debate. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see the Colonial Laws Validity Act, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional. (3)

(1) 4 Wheat. 316.

(2) 1 Commonwealth L. R. 91, at p. 112.

(3) Compare the address of the late Mr. Justice Field of the Supreme Court of the United States on the celebration of its centenary: "The power of the Court to pass upon the conformity with the Constitution of an Act of Congress, or of a State, and

But in the British Constitution, though sometimes the phrase "unconstitutional" is used to describe a statute which, though within the legal power of the Legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the statute in question is the law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests. The enactments to which attention has been directed do not seem to leave any room for implied prohibition. "Expressum facit cessare tacitum." And the language of the Commonwealth Act indicates with sufficient clearness that its framers had not overlooked, as indeed it would be impossible to suppose they could have overlooked, the Constitution of each State of the new Commonwealth as declared and enacted by the statutes under which they were created. It is quite true, as observed by Griffith C.J., in the above-mentioned case of *D'Emden* v. *Pedder* (1), that: "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them."

But it is an extraordinary extension of such a principle to argue that a similarity, not of words, but of institutions, must necessarily carry with it as a consequence an identity in all respects. It is to be observed that the principle is variously stated by the learned judge in two of the cases to which their Lordships were referred as containing the reasons for the

thus to declare its validity or invalidity, or limit its application, follows from the nature of the Constitution itself, as the supreme law of the land, —the separation of the three departments of government into legislative, executive and judicial . . . . each independent in its sphere, and the specific restraint upon the exercise of legislative power contained in that instrument. . . . . The unconstitutionality of an Act cannot be pronounced except as required for the determination of contested litigation." The Supreme Court of the United States, &c., Philadelphia, 1891, pp. 709, 710.—F. P.

(1) 1 Commonwealth L. R. 91, at p. 110.

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judgment under appeal. In *D'Emden* v. *Pedder* (1), the learned Chief Justice says: "We cannot disregard the fact that the Constitution of the Commonwealth was framed by a convention of representatives from the several Colonies. We think that, sitting here, we are entitled to assume—what after all is a fact of public notoriety—that some, if not all, of the framers of that Constitution were familiar, not only with the Constitution of the United States but with that of the Canadian Dominion and those of the British Colonies. When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from the provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation."

The first observation that arises upon this argument is that the Chief Justice does not state what are the provisions "undistinguishable in substance, though varied in form." And it is extremely difficult to understand the application of the principle involved unless the comparison is made clear by the juxtaposition of the provisions. The same learned judge, in *Deakin* v. *Webb* and *Lyne* v. *Webb* (2), says, as justifying his rejection of the relevancy of the distinction between the Governments of the United States and the constitution of the English monarchy, "It is a matter of common knowledge that the framers of the Australian Constitution were familiar with the two great examples of English-speaking federations, and deliberately adopted with regard to the distribution of powers the model of the United States in preference to that of the Canadian Dominion."

Again, it is somewhat difficult to know what it is to which the learned judge refers, and the only explanation he gives is that "they used language not verbally identical but synonymous for the purpose of defining that distribution." It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have

(1) 1 Commonwealth L. R. 91, at p. 113.

(2) 1 Commonwealth L. R. 585, at p. 606.

been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation. The Legislature must have had in their minds the constitution of the several States with respect to which the Act of Parliament which their Lordships are called upon to interpret was passed. The 114th section of the Constitution Act sufficiently shews that protection from interference on the part of the Federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the Legislature. For these reasons their Lordships are not able to acquiesce in the reasoning of the High Court judgments governing the judgment under appeal. They will therefore humbly advise His Majesty that the judgment of the Supreme Court of Victoria ought to be reversed, that it ought to be declared that the salary in question was rightly included in the State assessment and was liable to income tax, and that each party ought to pay his own costs of the special case and in the Supreme Court.

With respect to the objection urged—both as a preliminary objection and one of substance—to the hearing of the appeal at all by this Board, their Lordships are disposed to adopt the reasoning of the Supreme Court in giving leave to appeal. The only basis upon which the objection can be suggested to be founded is the Commonwealth Act, and no direct authority under that Act has been shewn. If, as Hodges J. says, there is no direct authority, it is not reasonable to suppose that the British Parliament ever intended so important an end to be attained by indirect or circuitous methods. "In such an important matter direct authority would be given, or none at all, and none is directly given." The learned judge continues: "I may further observe that the appeal to the King in Council was, as a matter of history, one of the matters that was prominently before the British Legislature at the time it passed the Commonwealth Constitution Act, and the extent to which a citizen's chance of getting a hearing from that august tribunal is affected is shewn in ss. 73 and 74. Neither of these sections authorizes the Commonwealth Parliament to take away the right in such a

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case as the one I am now considering, nor does any other section directly give such authority. And I think I might content myself by saying those two sections deal with this subject and do not authorize the Commonwealth Parliament to deprive the subject of this right of appeal against a judgment of the State Court, and no other section gives such authority."

Their Lordships also concur in what the same learned judge says at the end of his judgment: "If the Federal Legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of that Federal Legislature. And, in my opinion, it is outside their power to do that very thing in a roundabout way."

Their Lordships will therefore humbly advise His Majesty that the petition presented by the Commonwealth of Australia for a dismissal of the appeal on the ground of its incompetency ought to be dismissed.

There will be no order as to the costs of the appeal as between the appellant and the respondent. The Commonwealth must pay the appellant's costs of the intervention.

Solicitors for appellant: *Freshfields.*
Solicitors for respondent: *Broad & Cheston.*
Solicitor for intervenant: *J. H. Galbraith.*

[PRIVY COUNCIL.]

J. C.*
1906
Nov. 2.

TILONKO . . . . . APPELLANT;

AND

THE ATTORNEY-GENERAL OF THE COLONY OF NATAL . . . . . RESPONDENT.

ON APPEAL FROM A COURT-MARTIAL SITTING AT PIETERMARITZBURG, IN THE COLONY OF NATAL.

Courts-martial—Practice—Special Leave to Appeal refused.

There is no analogy between courts-martial, so called, administering punishments and restraining acts of repression and violence under the supervision of a military commander and the regular proceedings of Courts of justice.

Where the local Legislature has declared sentences of this kind to be lawful, the Judicial Committee has no power to inquire as to their propriety or as to the propriety of the legislation; and a petition for special leave to appeal from any such sentence must be dismissed.

THIS was a petition for special leave to appeal from a judgment of a military court and the sentence following thereon.

It stated that the petitioner was on July 30, 1906, indicted before a court-martial claiming to sit under a declaration of martial law for the crimes of sedition and public violence; that he objected to the trial on the grounds that he was not a military man, had not been taken in the field, had never taken up arms against the Government, that the state of the country was not such as to justify his being tried before a court-martial, and that the civil Courts before whom he had a right to be tried had in no way been interrupted in their functions and were then sitting. It alleged that the court-martial "arrogated to itself jurisdiction" under colour of a proclamation of martial law, a Colonial Office circular of January 26, 1867, and a mandate of the Governor addressed to the commandant of militia dated February 11, 1906; but that a state of war did not exist at the time of the proclamation, and that the powers of the common law were sufficient for the civil power to maintain order. The petitioner submitted that his

* *Present:* EARL OF HALSBURY, LORD MACNAGHTEN, LORD DAVEY, LORD ATKINSON, and SIR ARTHUR WILSON.

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trial before the military tribunal was without jurisdiction and illegal. The petitioner added that an indemnity Act of 1906 had been passed, which purported to approve of all sentences passed by any court-martial or by any Court or person exercising any judicial function under the authority of the general commanding officer of the Colonial forces in Natal subsequently to the proclamation, and confirmed all acts done and indemnified those who did them.

Jellicoe, for the petitioner.
Hansell, for the respondent.

1906 *Nov.* 2.

The judgment of their Lordships was delivered by

THE EARL OF HALSBURY. This is an application for special leave to appeal to His Majesty in Council. It is desirable to call attention to that fact, because the learned counsel for the petitioner has, from time to time, used the phrase that his right to appeal cannot be refused. There is no right to appeal. This is an application for special leave to appeal, which their Lordships have no difficulty in advising His Majesty to refuse.

The foundation upon which counsel for the petitioner has proceeded is a totally inaccurate analogy between the proceedings of a military court sitting under what is called the Mutiny Act, and proceedings which are not constituted according to any system of law at all. It is by this time a very familiar observation that what is called "martial law" is no law at all. The notion that "martial law" exists by reason of the proclamation —an expression which the learned counsel has more than once used—is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called "courts" to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or

regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings of so-called "courts-martial," administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of justice is quite illusory. Such acts of justice are justified by necessity, by the fact of actual war; and that they are so justified under the circumstances is a fact that it is no longer necessary to insist upon, because it has been over and over again so decided by Courts as to whose authority there can be no doubt.

But the question whether war existed or not may, of course, from time to time be a question of doubt, and if that had been the question in this case, it is possible that some of the observations of the learned counsel with regard to the period of trial, and the course that has been pursued, might have required consideration. But no such question arises here. An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question, and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction. This Board has no power to review these sentences, or to inquire into the propriety or impropriety of passing such an Act of Parliament. The only thing for persons who are subject to such an Act of Parliament to do is to obey. The question in this case arises under the Natal Act of Parliament in respect of offences committed in Natal, which Act has been assented to by the Governor and, having the force of law, is binding on their Lordships. The language of the Act appears to their Lordships to be subject to no question of doubt or ambiguity at all.

Sect. 6 enacts that, "All sentences passed by any courts-martial or by any Court or person administering martial law under the authority of the Governor or of the commandant of militia in Natal, or by any military officer purporting to exercise authority in that behalf, since the date of the aforesaid proclamation of February 9, 1906, including fines and other punishments inflicted by military officers in the field, are hereby confirmed and made and declared to be lawful, and in so far as the same shall not have been already carried into effect, shall be

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deemed to be final sentences passed by duly and legally constituted Courts of this Colony, and no appeal shall lie in respect of same, but they shall be and remain in force and shall be carried out in the same manner as the sentences of the Courts of law in this Colony."

Under these circumstances their Lordships feel that it is impossible to entertain any question of appeal, and they will therefore humbly advise His Majesty to dismiss the petition. Their Lordships are of opinion that in the circumstances of this case the petitioner ought to pay the costs of the petition.

Solicitors for petitioner : *Helder, Roberts, Walton & Giles.*
Solicitors for respondent : *Sutton, Ommanney & Rendall.*

J. C.* 1906 *Nov.* 20; *Dec.* 19.

[PRIVY COUNCIL.]

EQUITABLE FIRE AND ACCIDENT OFFICE, LIMITED . . . . . } DEFENDANTS;

AND

THE CHING WO HONG . . . . . PLAINTIFF.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AND COREA.

Policy of Fire Insurance—Notice required of Additional Insurance—Construction—Premium of additional Insurance unpaid.

Where there was a stipulation in a policy of fire insurance that it should become null and void if the insured omitted to give notice of any additional assurance effected on the same goods with another company without the consent of the insurers :—

Held, that the policy was not avoided by omission to give notice of an additional assurance which, on the true construction of its terms, never became effective by reason of the premium not having been paid.

APPEAL from a judgment of the above Court (July 8, 1905).

The respondents at the trial contended that the policy on which they sued was not invalidated under the circumstances stated in

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD ATKINSON.

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the judgment of their Lordships, inasmuch as their policy with the Western Assurance Company, of which they had omitted to give notice, contained a clause to the effect that it would not be in force until, nor will the company be "liable in respect of any loss or damage happening before, the premium or deposit on account thereof is actually paid," and no such payment or deposit had been made.

The appellants contended that the receipt for the premium contained in the body of the policy and the delivery of the policy to the respondents established that the Western Assurance Company had given credit to the respondents for the amount of the premium, and that the policy was in full force (no notice having been given) during the currency of the policy issued by themselves.

The Court below decreed recovery of the value of the goods insured and destroyed or damaged by fire.

Cohen, K.C., and *G. Boydell Houghton*, for the appellants, contended that the policy granted by the Western Assurance Company was valid and effective, and that, as notice had not been given thereof in accordance with the 12th condition of the policy granted by the appellants, the latter was rendered null and void. There was unconditional delivery of their policy by the Western Company, and an actual receipt for the premium given. The result was that actual payment was waived and credit given in respect thereof. They cited *Roberts* v. *Security Co., Ld.* (1) and *Farnum* v. *Phœnix Insurance Co.* (2)

The respondent did not appear.

1906
Dec. 19.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal from a judgment of His Majesty's Supreme Court for China and Corea at Shanghai, dated July 8, 1905. The action was brought by the respondents upon two policies of insurance against fire, dated respectively October 1, 1904, and November 14, 1904, effected by them with the appellant company upon stock in trade and other goods in a shop belonging to the respondents in Shanghai. The appellants denied their liability on two grounds, the first of which only was

(1) [1897] 1 Q. B. 111. (2) (1890) 17 American State Rep. 233, 5, 8.

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raised and argued before their Lordships. That ground of defence was that the policies had become null and void by reason of the respondents having omitted to give the appellant company notice of an additional insurance effected by the respondents with the Western Assurance Company, without the consent of the appellant company, on the same goods. The respondents denied that there was, at the date of the fire, or ever had been, any effective insurance with the Western Assurance Company. The learned judge who tried the action gave judgment for the respondents.

The policies sued on were in the same form. They both contained a clause in Chinese characters immediately following the operative part of the policy in these words: "No additional insurance on the property hereby covered is allowed except by the consent of this company indorsed hereon. Breach of this condition will render this policy null and void."

And one of the conditions indorsed on the policies was as follows: "12. The insured must, at the time of effecting the insurance, give notice to the company of any insurance or insurances already made elsewhere on the property hereby insured, or any part thereof, and on effecting any insurance or insurances during the currency of this policy elsewhere on the property hereby insured, or any part thereof, the insured must also forthwith give notice to the company thereof so that the particulars thereof may be indorsed on the policy, and unless such notice be given, the insured will not be entitled to any benefit under this policy, and on the happening of any loss or damage, the insured shall forthwith declare in writing, to the company, all other insurances effected by him, or by any other person, on any of the property, and the giving of such notices at the respective times aforesaid shall be a condition precedent to the recovery of any claim under this policy."

The fire took place on December 5, 1904. Prior to that date a policy, dated December 1, 1904, had been executed by the directors of the Western Company in favour of the respondents for 3000 taels. This policy was found in the respondents' safe after the fire, but the premium on it was never paid.

The Western Company's policy was not put in evidence at the

trial, but it may be assumed that it was in the same form as the specimen to be found in the record, and also that it was intended to cover the same goods as the appellant company's policies. The finding of the learned judge with respect to it is: "No premium was paid on it, the plaintiffs" (the present respondents) "and the Western have treated it as non-existing, and no claim has been made under it or will be made under it." Whether under these circumstances the appellant company can resuscitate an instrument which the parties to it agree in treating as void for the purpose of avoiding its own liability, is open to question. And it would perhaps be enough for the decision of this appeal to say, as the learned judge in effect finds, that there was no sufficient evidence before the Court of the existence of any insurance of which the respondents were bound to give notice to the appellant company. But as the point which was relied on by the appellant company has been fully argued before them, their Lordships think it better to express their opinion upon it.

According to the specimen or blank form of the Western Company's policies in the record it was witnessed that the insured, having paid the sum of (blank) for insuring against loss or damage by fire the property (described) in the sum (mentioned), the company agreed (but subject to the conditions on the back thereof, which were to be taken as part of the policy) that if the property described should be destroyed or damaged by fire, and so forth, the company would pay certain sums. And the 11th indorsed condition was in the following words: "This insurance will not be in force until, nor will the company be liable in respect of any loss or damage happening before the premium, or a deposit on account thereof, is actually paid, and no such payment or deposit and no payment in respect of the renewal of this policy shall be good unless a printed form of receipt for it, issued from the office of the company and signed by one of the company's authorized officers or agents, shall have been given to the insured."

The question, therefore, is whether, the premium not having been paid either wholly or partially, the policy executed by the Western Assurance Company ever became effective, and this must be decided in the same way as if an action had been brought

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EQUITABLE FIRE AND ACCIDENT OFFICE, LIMITED v. THE CHING WO HONG.

by the respondents on that policy. The Western Company, it should be said, always repudiated any liability, and the respondents, of course, did not seek to enforce it.

It is plain from the language of the condition that it applies as well to the first premium as to any renewal premium, or indeed it may be said that it applies primarily to the first premium. The instrument must be read as a whole for the purpose of ascertaining the intention of the parties, and effect, so far as possible, must be given to every part of it. Their Lordships are of opinion that the 11th condition qualifies and restricts the engagement of the company and converts what would otherwise be an absolute engagement into a conditional one, and that the words "having paid" to the company are common form words or words of style for expressing the consideration for the company's engagement which would become accurate when that engagement became effective. The Judicature Act provides that where the rules of law and of equity differ the rules of equity shall prevail. It is familiar law that in equity a vendor was never held to be estopped by a statement in the conveyance that the purchase-money had been paid, or even by an indorsed receipt for the money signed by him, so as to exclude the enforcement of the vendor's lien. Their Lordships think that in any case the parties should not be held in equity to be estopped as between themselves from shewing that the consideration had not in fact been paid. But in the present case they think that the condition read with the operative part of the instrument negatives any such estoppel; for the only meaning which can be given to the words is that the consideration must be not only expressed to be paid, but actually paid. Their Lordships cannot treat the fact of the executed policy having been handed to the respondents as a waiver of the condition or attach any importance to the circumstance. What was handed to the respondents was the instrument with this clause in it, and that was notice to them, and made it part of the contract that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed.

The learned counsel for the appellant company cited and relied on a decision of the Court of Appeal in England in *Roberts* v.

Security Co., Ld. (1) It is enough for their Lordships to say that the words of the instrument in that case were different from those which their Lordships have to construe, and they are relieved from saying whether they would otherwise have been prepared to follow it.

No other point was argued before their Lordships, who will therefore humbly advise His Majesty that the appeal should be dismissed. As the respondents do not appear, there will be no order as to costs.

Solicitor for appellants: *A. P. Stokes.*

[PRIVY COUNCIL.]

PREFONTAINE . . . . . PLAINTIFF;

AND

GRENIER . . . . . DEFENDANT.

J. C.*
1906
July 11, 12; *Nov.* 2.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Liability of Director of Bank—Overdrafts of Customers improperly allowed by Cashier of Bank—Failure to detect Errors in audited Accounts—Alleged Negligence.

Where the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the directors, had irregularly and improperly allowed to certain customers:—

Held, that by the law of Quebec as by the law of England, a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts.

Dovey v. *Cory*, [1901] A. C. 477, followed.

APPEAL from a decree of the above Court (February 27, 1906) affirming a decree of the Court of review, which had reversed a

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, SIR HENRI ELZÉAR TASCHEREAU, and SIR ALFRED WILLS.

(1) [1897] 1 Q. B. 111.

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decree of the Superior Court in favour of the appellant to the extent of $43,967.

The appellant sued, under the circumstances detailed in the judgment of their Lordships, to recover damages from the respondent, who it was alleged, by personal statements made to the appellant and by his signed statements of the affairs of the bank communicated to the shareholders and to the public, had represented in effect that the bank of which the respondent was president was in a condition of great prosperity, whereas in reality it was in a deplorable condition owing to maladministration and neglect of duty on the part of the president of the officers, over whose actions he entirely omitted to exercise proper supervision. He prayed to recover as damages the amount which he had paid for his shares in the bank, and also the amount which, as director with unlimited liability, he had been compelled to pay to the creditors and depositors of the bank. The Superior Court dismissed the action so far as it related to the price of the shares, but gave judgment as above on the other branch of the case. The Court of review dismissed the action as barred by a two years' prescription. The Court of King's Bench found that no fault had been proved against the respondent.

McMaster, K.C., Perron, K.C., and *G. A. Campbell*, for the appellant, contended that the evidence established the charges of misrepresentation and negligence. They relied on s. 99 of the Dominion Bank Act (53 Vict. c. 31), and referred to *Dovey* v. *Cory*. (1)

Beique, K.C., Rowlatt, and *D. C. Robertson*, for the respondent, were not heard.

1906

Nov. 2.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The controversy between the parties to this appeal arises out of the collapse of the Banque du Peuple, a bank that carried on business in Montreal and elsewhere in the province of Quebec, which collapse occurred on July 16, 1895, when the bank closed its doors.

The bank was constituted in 1843 by an Act of the then Canadian Legislature (7 Vict. c. 66). That Act laid down the

(1) [1901] A. C. 477, 482.

constitution of the bank on lines which can be briefly stated. Certain specified persons and their successors were created a corporation, were to have the management of the affairs of the bank, and were to to be individually, jointly and severally, liable for all the debts contracted by the corporation. With them also lay the appointment of officers, clerks, and servants. The members of the corporation have throughout the case also been called "directors." There was to be another class of persons interested in the bank (*commanditaires*) who were to be subject to no liability beyond the amount of the stock for which they subscribed. The profits were divisible among the shareholders, of both classes alike, according to the amounts of stock held by them.

The 3rd section made it clear that the management of the bank lay with the members of the corporation, or so many of them as might be chosen for the purpose by a majority of the body. The same body was to keep regular books of accounts, to be balanced half-yearly. And by s. 17: "The said books of account which it shall be the duty of the said corporation to keep, as aforesaid, and the statement and inventory which it shall be the duty of the said corporation to prepare semi-annually as aforesaid, and all vouchers connected therewith, and generally all the deeds, books and papers of the said corporation shall, during the last fifteen days of the months of February and August, in each and every year, but at no other period, be open to the examination of a board of audit, to be elected as hereinafter provided; the said deeds, books and papers shall not, however, be removed from the office of the said bank."

By s. 18: "On the first Monday of March in every year during the continuance of this Act, a general meeting of all the stockholders of the said corporation, including as well the members of the said corporation as each of the said partners in commendam (*commanditaires*) shall be held at the office in Montreal of the said corporation, of which general meeting one month's notice shall be given in two or more of the newspapers published in the said city of Montreal in the English and French languages; and at the said meeting a full and clear statement of the affairs

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of the said corporation shall be submitted, containing on the one part the amount of capital stock paid in, the amount of notes of the bank in circulation, the net profits in hand, the balances due to other banks and institutions, and the cash deposited in the bank, distinguishing deposits bearing interest from those not bearing interest, and, on the other part, the amount of current coins and gold and silver bullion in the vaults of the bank, the value of buildings and other real estate belonging to the bank, the balances due to the bank from other banks and institutions, and the amount of debts owing to the bank, including and particularizing the amounts so owing on bills of exchange, discounted notes, mortgages and hypothecs, and other securities; thus exhibiting, on the one hand, the liabilities of, or debts due by, the bank, and, on the other hand, the assets and resources thereof; and the said statement shall also exhibit the rate and amount of the then last dividend declared, the amount of profits reserved at the time of declaring such dividend, and the amount of debts to the bank over-due and not paid, with an estimate of the loss which may probably be incurred from the non-payment of such debts."

Sect. 19: "At the annual general meeting so to take place on the first Monday of March, all the said partners in commendam (*commanditaires*) of the said corporation then present, shall by vote elect from among themselves three persons to be a board of audit; and it shall be the duty of the said board of audit so elected to look into all the operations of the said corporation, and to examine the books of account, papers and vouchers of the said corporation, which books, papers and vouchers shall be accessible to the said board of audit as provided for in the seventeenth section of this Act; and it shall be the duty of the said board of audit to make their report thereon at the next general meeting of the said corporation to be held on the first Monday of March as aforesaid; and each partner in commendam (*commanditaire*) shall have one vote and no more, and if there be an equal division as to the appointment of any person to be a member of the said board of audit, the partner in commendam (*commanditaire*) then present, having the largest quantity of stock in the said corporation, shall have a casting vote; and it

shall be lawful for any absent partner in commendam (*commanditaire*) to give their, his or her vote respecting the nomination of the said board of audit by proxy, such proxy being also a partner in commendam (*commanditaire*) and being provided with a written authority from his constituent or constituents, and which authority shall be lodged in the bank."

Sect. 22 empowered the majority of the corporation, if of opinion that it should be necessary to require one or more of its members to devote an exceptional amount of time to the affairs of the bank, to compensate such member or members by salary or otherwise.

The respondent Grenier was president of the bank. At first he received a remuneration of $1000, as had his predecessor in office. In March, 1887, his remuneration was raised to $2000, under a resolution, in the following terms :—

Les affaires de routine étant terminées sur la suggestion de M. Brush, vice-président, il est résolu à l'unanimité que la somme de $1000 soit placée au credit de M. Jacques Grenier, en reconnaisance de son zèle, de son assiduité et de ses services comme président de la Banque du Peuple pour l'année se terminant le 1er mars, 1887. Cette somme de $1000 n'affecte en rien l'allocation ordinaire qui comme d'habitude est portée au crédit du président, tous les six mois.

On May 6, 1889, Grenier was re-elected as president under a resolution which runs as follows :—

"En conformité de l'article cinq de l'acte d'incorporation, l'assemblée de ce jour a pour objet d'élire le président et le vice-président de la corporation de la Banque du Peuple pour l'année courante.

"L'ordre de l'assemblée est adoptée sur proposition de MM. G. S. Brush, Ecr., secondé par A. Leclaire, Ecr., il fut résolu que J. Grenier, Ecr., soit réélu président de cette banque pour l'exercice se terminant le premier lundi de mai, 1890.

"M. Grenier à la condition toute spéciale qu'aucun document ou transaction faite au nom de la banque soient bien et dûment par le caissier soumis à lui-même pour être approuvés, signés ou endossés et ce dans le but de partager en toutes occasions avec le caissier la responsabilité des engagements de la banque

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lesquels devront aussi être soumis à la direction pour approbation." (1)

Prior to May, 1894, Préfontaine, the appellant, was one of the *commanditaires* of the bank, with a holding of thirty-one shares. He then purchased a further number of sixty-nine shares, and at about the same time he was elected by the directors or members of the corporation to be one of their number. By accepting that position he, of course, became subject to the special liabilities imposed by the Act upon the members of the body which he thus joined.

From that time down to shortly before July 16, 1895, when the doors were closed, the bank went on in apparent prosperity. As to the cause of the collapse that then occurred there is no doubt. It was due entirely to the fact that the cashier of the bank, without the sanction or knowledge of the respondent Grenier, or his co-directors, and in disobedience to their general instructions, had allowed large overdrafts, partly in current account and partly in other forms, to certain favoured customers, overdrafts which amounted in all to a large sum.

Préfontaine instituted the present suit against Grenier on November 24, 1900. In his declaration, which was further explained by particulars delivered under an order of the Court, he complained that the defendant, as president of the bank, had made false representations both to the shareholders generally and to Préfontaine himself in particular, by means of which the latter had been induced to purchase the additional shares which he did purchase, and had also been induced to become a director or member of the corporation, in consequence of which he incurred the special liabilities attaching to one of that body. He complained, secondly, that the defendant had been guilty of negligence in the conduct of the affairs of the bank, and failed in the duty which lay upon him as president under the circumstances of the case, and had so brought about the failure of the bank and

(1) *Sic*, and certified as "vraie copie," in the record: but the second sentence is obviously imperfect, and the elliptical use of "exercice" alone for "term of office" can hardly have been intended (see for the correct locutions Littré, *s.v. exercice* 11°). It may be conjectured that the so-called resolution is a rough minute of a resolution which was never drawn up in proper form.—F. P.

the losses sustained by the plaintiff. He claimed as damages $8625 which he had paid for his shares, and $45,914.89, the amount which he ultimately had to pay, as the result of the liquidation, in respect of his liability as a director or member of the corporation.

Thus from the early stages of the case the plaintiff has been suing upon two alleged causes of action, misrepresentation and negligence. These causes of action have not always been kept apart in argument; but they are perfectly distinct, and governed by different legal principles.

The case was tried before Robidoux J., who decided in favour of the plaintiff, so far as concerned the amount which he had been obliged to pay in respect of his liability as director or member of the corporation, while he dismissed the claim so far as it concerned the price of the shares.

The defendant brought the case by way of review before three judges, who agreed with Robidoux J. on the merits of the case, but by a majority decided that the action was barred by prescription.

From that decision there was a further appeal to the Court of King's Bench, and that Court considered it unnecessary to deal with the question of prescription, because it considered that the plaintiff's case failed irrespective of that question. Against that judgment the present appeal has been brought.

The case of the plaintiff appellant, so far as it rested upon misrepresentation, was based, in the argument before their Lordships, upon the report issued for the year 1893, dated March 1, 1894, with the statements of accounts annexed to that report, read in connection with the like reports and statements relating to previous years.

The alleged misrepresentations thus relied upon were three in number. First, the report said, "All our agencies have been thoroughly inspected during the year." In fact the agencies outside Montreal had been inspected, but certain branches, or agencies, within that city had not been so inspected. It is unnecessary to inquire whether, on the proper construction of the report, the words in question referred to all the agencies or branches, including those within the city of Montreal, or only to

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those outside the city, because it was no part of the plaintiff's case that he was misled into purchasing shares or becoming a director by any such misrepresentation as that now contended for. In his declaration, supplemented by his particulars, the plaintiff defined his case in all points; and he nowhere said that he was induced to act by any such misrepresentation as this. He did in his particulars put forward want of inspection of the head office as an instance of negligence, or default, on the part of the defendant, but that is a totally different matter, and belongs to a different part of the case.

It was next said that the report and the account annexed to it untruly represented that the bank possessed a reserve fund of $600,000. But in the opinion of their Lordships the account, which is the more important document of the two, and which was the basis of the report, makes no such representation. That account is of the nature of a balance-sheet. It enters the amount of the reserve fund as an item under the head of liabilities, as it was proper to do; but when one turns to the other side of the account, under the heading "Assets," there is nothing to suggest that the bank held any investment of corresponding amount which could be thought to represent the reserve fund. There was nothing which could properly be understood as conveying that that fund was more than an estimated amount, or was anything separately held or separately invested.

Then it was said that there was a misrepresentation in another respect. The amounts of the overdrafts, improperly allowed by the cashier to certain customers, were included in the amounts which appeared in the account as assets, and there was no complaint that the aggregate on this side of the account was not correct. But the suggestion was that the sums in question ought to have been included in the item "Notes and bills overdue, unsecured," whereas, in fact, they were included in "Loans and discounts current." It appears to their Lordships that the sums in question were at least as correctly treated, in the account, in the manner in which they were treated, as they would have been if entered in the manner in which it is said that they ought to have been. Their Lordships therefore agree with the Court of King's Bench that the plaintiff's case based upon misrepresentation fails

on the facts, and it is unnecessary to consider any of the questions of law which might otherwise have arisen.

The second branch of the plaintiff's case is based on alleged negligence on the part of the defendant in the discharge of his functions as president of the bank. It has been already stated that the collapse of the bank was due to overdrafts, which the cashier had irregularly and improperly allowed to certain customers. The main ground upon which the defendant was charged with negligence was that he had not exercised such a control over the details of the bank's business as to enable him to detect and put a stop to the irregular practices of the cashier.

Before examining the question of his liability, it may be well to notice that the cashier was the principal executive officer of the bank under the directors. There is nothing to shew that either the defendant or his brother directors had any reason to suspect or distrust that officer. The accounts periodically submitted to the directors were prepared by him, or under his directions. They were duly audited by the board of auditors appointed under s. 19 of the Act by the body of *commanditaires*, such auditors being thus entirely independent of the directors. In those accounts the total assets and liabilities of the bank were correctly stated according to the books, but the accounts were so framed as not to disclose the fact that the totals included unauthorized overdrafts. The contention on the part of the plaintiff was that it was the duty of the defendant to have exercised such control as to have detected the overdrafts which were, in fact, concealed from him and from his co-directors.

The alleged duty of the defendant was based, first, upon the fact that he was the president of the bank, and, secondly, that he received a salary for acting in that capacity. Reliance was further placed upon the resolution already cited of May 6, 1889.

In this country questions as to the nature and extent of the duty and responsibility of directors and others, in respect of the conduct of the affairs of companies, have been frequently under consideration. Attempts have repeatedly been made to render them personally liable, on the ground that they have trusted the regularly authorized officers of the company; that they have failed to detect, and been misled by, misrepresentation or

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concealment by such officers, when there was no reason for doubting their fidelity. But such attempts have not been successful. It is sufficient to refer to the case of *Dovey* v. *Cory* (1), in which the subject was fully considered by the House of Lords. Their Lordships think that in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, nor upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and the exigencies of business.

The fact that the defendant was remunerated for his services as president does not seem to their Lordships to strengthen the case against him. Indeed, the modest scale of his remuneration is scarcely consistent with the idea that he, a man of considerable position, and with a business of his own, was ever expected to give his time and labour to the detailed control of the work of the bank. It is much more consistent with the idea that he was expected to do what he did, that is to say, to devote some two hours a day to the business of the bank, two hours largely taken up by official interviews.

The resolution of May 6, 1889, is very hard to follow, and no one has succeeded in construing it clearly, but it seems to their Lordships certainly not to strengthen the case of the plaintiff. So far as anything can be collected from it, it seems to shew that the obligation of the defendant to share responsibility with the cashier was limited to the "engagements of the bank," whatever those words may mean; and, further, that the directors were also to be bound to approve each transaction falling within that class. The grounds, therefore, put forward by the plaintiff as supporting the general allegation of the defendant's liability, appear to their Lordships insufficient to do so. And, further, the Court of King's Bench was, in their Lordships' opinion, right in laying stress upon the fact that the accounts laid before the defendant and his co-directors, in which it is said

(1) [1901] A. C. 477.

that the defendant ought to have detected what was concealed, had been audited by a wholly independent body of auditors, and certified by them as correct, and there is nothing shewn which should have led the defendant to doubt the sufficiency of the audit.

A special charge of negligence was pressed against the defendant in the argument of the appeal, based upon the evidence of a M. Gagnon, who held the post of inspector under the bank.

There is nothing in the evidence to shew the terms of his appointment, and no formal definition of the extent of his duties. The defendant said in his evidence that Gagnon's duties were limited to the inspection of branches and agencies outside the city of Montreal. On one occasion Gagnon was specially employed to examine into a matter in the head office. He says he was dissatisfied with what he found, and that he pressed upon the defendant that he, Gagnon, should be empowered to make a completer inspection. He says that his suggestion was not very well received, that the defendant rejected the idea that the inspector should be put to supervise the work of the head official of the bank.

It was contended that the omission to authorize the suggested inspection was an act of negligence on the part of the defendant, and that if the suggested inspection had been carried out the overdrafts which led to the fall of the bank would, or might have been, brought to light. Their Lordships are not prepared to say that there was negligence in omitting to sanction an inspection inconsistent with the ordinary method of conducting the affairs of the bank, nor has it been shewn that there was any direct connection between the matters excepted to by Gagnon and the fatal overdrafts.

Their Lordships agree with the Court of King's Bench that the charge of negligence has not been established in fact. It is therefore unnecessary to consider (what might have been a difficult question of law) whether the obligation of the defendant, which, whatever its nature and extent, was primarily a contractual obligation, could be made the ground of an action by an individual member of the corporation, as distinguished from the bank in its

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entirety, and from the smaller body, the directors or members of the corporation.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Hills & Halsey.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1906 *Nov.* 21, 22; *Dec.* 14.

RICHELIEU AND ONTARIO NAVIGATION COMPANY (OWNERS OF S.S. CANADA) . . } APPELLANTS;

AND

OWNERS OF S.S. CAPE BRETON . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Supreme and Exchequer Courts Act, 1875, *s.* 47—*Colonial Courts of Admiralty Act*, 1890, *s.* 6—*Judgment of Supreme Court exercising Admiralty Jurisdiction—Special Leave to Appeal unnecessary.*

Notwithstanding the provisions of the Canadian Supreme and Exchequer Courts Act, 1875, s. 47, with respect to the finality of the judgments of the Supreme Court, an appeal lies as of right under s. 6 of the Colonial Courts of Admiralty Act, 1890, from a judgment of the said Court when pronounced in an appeal thereto from a decree of the Colonial Court of Admiralty constituted in pursuance of and exercising jurisdiction under the said Act.

APPEAL from a judgment of the Supreme Court (October 3, 1905), wherein they declared the appellants' steamship *Canada* to be solely to blame for a collision between her and the *Cape Breton* in the St. Lawrence river on June 12, 1904, and to that extent varied the judgment of the local judge in Admiralty (Exchequer Court of Canada, Quebec Admiralty District) dated November 19, 1904, declaring both steamships to be to blame for the said collision.

It was admitted before their Lordships that the *Canada* was to

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, and SIR J. GORELL BARNES. *Nautical Assessors:* ADMIRAL RODNEY M. LLOYD, C.B., and CAPTAIN W. F. CABORNE, C.B., R.N.R.

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blame, and the question decided was whether the *Cape Breton* was also to blame. The respondents, however, took the preliminary objection that, as the appellants had not obtained special leave to appeal, the judgment was under s. 47 of the Canadian Supreme and Exchequer Courts Act, 1875 (R. S. C. c. 135, s. 71), final and conclusive.

Butler Aspinall, *K.C.*, *Meredith*, *K.C.*, and *Balloch*, for the respondents, referred to 3 & 4 Will. 4, c. 41, s. 2; 26 & 27 Vict. c. 24, s. 22, and its amending Act (30 & 31 Vict. c. 45), as giving and recognizing appeals to the Crown from Vice-Admiralty Courts. In 1890 all provisions as to Vice-Admiralty appeals were repealed and a new Code established: see the Colonial Courts of Admiralty Act, 1890, s. 14. The old Admiralty Courts being gone, the Acts giving a right of appeal no longer applied, and the Act of 1875 makes the judgments of the Supreme Court final. Reference was made to *The Peerless*. (1)

Pickford, *K.C.*, and *Bailhache*, for the appellants, referred to the Act of 1890, s. 6, sub-s. 1, and s. 15.

1906
Dec. 14.

The judgment of their Lordships was delivered by

SIR J. GORELL BARNES. In this case the appellants, the owners of the steamship *Canada*, appeal from a judgment of the Supreme Court of Canada dated October 3, 1905, allowing an appeal from a judgment or decree of the judge in Admiralty of the Exchequer Court of Canada, Quebec Admiralty District, pronounced on November 19, 1904, and ordering and adjudging that the said judgment should be reversed and set aside, and that the steamship *Canada* was alone to blame for a collision between the respondents' steamship *Cape Breton* and the said steamship *Canada* in the river St. Lawrence a short distance below the town of Sorel, on June 12, 1904, at about 2.35 A.M., and that the steamship *Cape Breton* and her owners were entitled to recover from the appellants, and condemning the appellants to pay to the steamship *Cape Breton* and her owners the damages arising out of the said collision, and that the action should be remitted to the said Exchequer Court of Canada for the assess-

(1) (1860) Lush. 30.

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ment of such damages, and that the appellants should pay the costs below and in the Supreme Court. The aforesaid judgment or decree of the local judge in Admiralty of the Exchequer Court, Admiralty District of Quebec (the Honourable Adolphe Basile Routhier) pronounced both vessels to blame for the said collision, and decreed accordingly, and in this appeal the appellants contend that the judgment of the Supreme Court of Canada should be reversed and the judgment of the judge in Admiralty restored, while the respondents contend that the appeal should be dismissed.

A preliminary point was raised by the respondents that, as the appellants had not applied for nor obtained the leave of His Majesty to bring this appeal, the judgment of the Supreme Court of Canada is final and conclusive by virtue of the provisions of the Canadian Act, the Supreme and Exchequer Courts Act, 1875 (38 Vict. c. 2, s. 47), which provides that "The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard: Saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal Prerogative."

But the answer made to this preliminary point by the appellants was that, notwithstanding the provisions of the Act aforesaid, an appeal lies by virtue of the provisions of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), which amended the law respecting the exercise of Admiralty jurisdiction in Her Majesty's dominions and elsewhere out of the United Kingdom.

Sect. 2 of the last-mentioned Act provided for the establishment and jurisdiction of Colonial Courts of Admiralty.

Sect. 3 gave power to the Legislature of a British possession by Colonial law to declare any Court of limited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and to provide for the exercise by such Court of its jurisdiction under the said Act, and to limit, territorially or otherwise, the extent of such jurisdiction. In pursuance of this section the Canadian Act of 1891 (54 & 55

Vict. c. 29, s. 3) declared the Exchequer Court of Canada to be, within Canada, a Colonial Court of Admiralty, and provided for the exercise by such Court of the jurisdiction, powers, and authority conferred by the said Act of 1890 and by that Act; and s. 6 provided for the appointment of local judges in Admiralty and (s. 9) for the exercise by them of Admiralty jurisdiction and the powers and authority relating thereto within their respective districts, and s. 14, sub-s. 2, gave an appeal direct to the Supreme Court of Canada from any final judgment, decree, or order of a local judge subject to the provisions of the Exchequer Court Act regarding appeals.

Sect. 5 of the Act of 1890 provides that, "Subject to rules of Court under this Act, judgments of a Court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act shall be subject to the like local appeal, if any, as judgments of the Court in the exercise of its ordinary civil jurisdiction, and the Court having cognizance of such appeal shall for the purpose thereof possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty."

Sect. 6, sub-s. 1, of the Act of 1890 provides that, "The appeal from a judgment of any Court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is, as of right, no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council"; and by s. 15 the expression "local appeal" means "an appeal to any Court inferior to Her Majesty in Council."

Their Lordships are of opinion that the express provisions of the said 6th section of the Act of 1890 conferred the right of appeal to His Majesty in Council from a judgment or decree of the Supreme Court of Canada pronounced in an appeal to that Court from the judgment or decree of the Colonial Court of Admiralty for Canada constituted under the Acts aforesaid given or made in the exercise of the jurisdiction conferred upon it by the said Act of 1890. Their Lordships therefore permitted the appeal to proceed upon the merits, and the case was accordingly heard.

The case arose out of the collision already referred to, and on June 21, 1904, the owners of the *Canada* brought their action

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against the *Cape Breton* in the Exchequer Court of Canada, Quebec Admiralty District, to recover for the damages which they had sustained by the collision. In that action the defendants counter-claimed for the damages which they had sustained in the collision. The case was heard before the local judge already mentioned, and in November, 1904, he delivered an elaborate judgment and pronounced his decree aforesaid, holding both vessels to blame for the collision. From this judgment the defendants (respondents) appealed to the Supreme Court of Canada. The appeal was heard by Sir Elzéar Taschereau C.J., and Sedgewick, Girouard, Nesbitt, and Idington, JJ., and the Court (Girouard J. dissenting) held that the *Canada* was alone to blame.

The appellants on the present appeal admitted that the *Canada* was to blame, and the sole question to be determined on this appeal is whether the *Canada* was solely to blame or whether both vessels were to blame.

The evidence in the case is extremely voluminous, the witnesses on both sides having been examined and cross-examined at extraordinary length; but the facts of the case are very simple, and the point upon which the matter to be determined on this appeal rests is a very short one. In order to make this plain it is necessary to state shortly the circumstances under which the collision took place.

The *Canada* is a paddle-wheel passenger steamer of 1167 tons register. She was bound, on the occasion in question, from Quebec towards Sorel, a place on the south side of the river St. Lawrence. Her regulation lights were duly exhibited and burned brightly, and she had electric lights in her saloons and cabins. She was proceeding, shortly before the collision, up the deep water channel, which is about 300 feet wide, marked by red buoys on the north side and by black buoys on the south side, and after passing a black buoy marked on the chart as 141 L she starboarded her helm with the object of proceeding from the deep-water channel towards Sorel.

The *Cape Breton* is a screw cargo steamer of 1180 tons register and 1764 tons gross register, engaged in the coal trade between Sydney, Quebec, and Montreal. She had been at anchor off

the harbour of Sorel on the morning in question, had weighed anchor, and was proceeding down the St. Lawrence with her regulation lights duly exhibited, and thus met in the same channel the *Canada*, which was proceeding up the river.

Stating the facts very shortly, so far as it is now necessary to state them, the *Canada* proceeded up the channel, and, after some slight alterations in her course, as her witnesses allege, her helm was starboarded with the object of directing her course towards Sorel, and it seems now clear that that course was taken without those on board the *Canada* having noticed any coloured light on board the *Cape Breton*, and without having given any signal to the *Cape Breton* that the *Canada* was proceeding to cross the channel in the direction of Sorel. It seems also clear that those on board the *Cape Breton*, which was proceeding on her proper side of the channel, had noticed the *Canada* proceeding up the channel, and that at first she was noticed slightly on the starboard bow, but in the course of her progress, owing to the slight bend in the channel, the *Canada* crossed on to the port bow of the *Cape Breton* and both vessels were approaching red to red, but at first after such crossing it seems that the *Canada* for a moment opened her green light so as to give a flash of it to those on board the *Cape Breton*, and that it was closed in again, and the vessels approached red light to red light.

It was stated on behalf of the *Cape Breton* in the evidence that afterwards, as the vessels drew nearer, the *Canada* shewed all three lights, and that thereupon the pilot of the *Cape Breton* ordered the helm slightly to port and gave one short blast of the whistle, expecting that, when those on the *Canada* had their attention drawn to the *Cape Breton*, she would resume her course, close her green light, and pass port side to port side. Instead, however, of doing so, the *Canada* sounded two short blasts of her whistle and kept on under her starboard helm. Directly the *Canada* gave these two short blasts, the pilot of the *Cape Breton* ordered his helm hard-a-port and his engines full speed astern, and the whistle was sounded again. Almost immediately afterwards the two vsesels came into violent collision, the *Cape Breton* being under her port helm and with her engines reversing full speed astern, and the *Canada* being under her starboard helm

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and going full speed ahead at about fourteen knots. The *Cape Breton* came into contact with the *Canada* on the starboard side of the latter, and the *Canada* sustained so much damage that she sank, and some lives were lost. The *Cape Breton* also sustained damage.

A great contest was raised at the trial as to whether or not the *Cape Breton* was properly exhibiting her side lights for a steamer under way, but that question was decided in favour of the *Cape Breton*, and it was further held that those on board the *Canada* were not keeping a proper look-out. They appear to have taken the white masthead light of the *Cape Breton* for a steamer at anchor, and never to have noticed either side-lights of the *Cape Breton* until the *Cape Breton* signalled with her whistle to the *Canada*. The *Canada* was clearly to blame in this case for a defective look-out and improperly crossing the course of the *Cape Breton* under her starboard helm, thus breaking the provisions of art. 25 of the Regulations for Preventing Collisions at Sea.

An attempt appears to have been made to justify the action of the *Canada* by virtue of the 33rd rule of the local regulations, which provides that, "Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships or vessels entering or leaving the harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding." But this rule was not applicable to the place where the collision took place, and there is nothing in the circumstances which would in any way justify the *Canada* in leaving her own side of the channel and attempting to cross the bows of the *Cape Breton*. The fact that vessels do at times cross over towards Sorel at about the place where the *Canada* starboarded, and that the *Canada* had lights in her cabins which might have shewn that she was a passenger vessel bound to ports on the river, was urged at the trial by the appellants as a reason for holding the *Cape Breton* responsible for not taking action for the *Canada* sooner than was done.

As soon, however, as it is determined that the action of the *Canada* was unjustifiable and contrary to the rules applicable to the place of the collision, the sole question left is whether

anything was done or omitted to be done on board the *Cape Breton* for which she ought to be held responsible. The main point taken against the *Cape Breton* on the appeal was that, as the vessels were approaching, the green light of the *Canada* must have been shewn to the *Cape Breton* for such a length of time that those on board the *Cape Breton* ought to have noticed that the *Canada* was attempting to cross her bows in the direction of Sorel, and that the *Cape Breton* ought to have taken action earlier than was done, that is to say, that those in charge of her ought either to have stopped their vessel or to have starboarded their helm and passed the *Canada* green light to green light. This argument was sought to be enforced by a minute criticism of the courses and positions of the vessels principally as given in the evidence of the pilot and other witnesses on board the *Canada;* but the answer to it seems to be reasonably clear to their Lordships, viz., that those on board the *Canada* did not notice, as already stated, the coloured lights of the *Cape Breton*, and, therefore, there is nothing in their evidence to negative distinctly the affirmative evidence on the part of the witnesses from the *Cape Breton* that it was only when the vessels were a short distance apart that the green light of the *Canada* suddenly opened on their port bow in the attempt of the *Canada* to cross the channel. At that moment, having regard to the fact that the *Canada* had once before, for a moment, shewn her green light and had then shut it out, the pilot of the *Cape Breton* might at first think that she was repeating an act of erroneous steering and would recover her course, and, therefore, he gave her the one-blast signal and ported slightly to give more room for her to do so, as there was no reason for him to suppose that the *Canada* was bound otherwise than on a course up the channel. After that, as already noticed, the helm of the *Cape Breton* was put hard-a-port, and her engines put full speed astern, when the *Canada* gave two short blasts and indicated that she was about to cross the bows of the *Cape Breton*.

The questions, therefore, which are raised depend upon the answers to the two following questions which their Lordships have submitted to the Nautical Assessors who have assisted them on the hearing of this appeal, and are based upon the evidence

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given by those on board the *Cape Breton*, which appears to be in accordance with the true facts and probabilities of the case, although the learned judge who heard the case in the first instance felt some doubt upon the matter. The questions are: (1.) Was the pilot of the *Cape Breton* justified in assuming, until he heard the two short blasts from the *Canada*, that the *Canada* could and would pass his vessel port side to port side? (2.) Did such pilot omit any proper precaution after hearing those two short blasts, or did he do all that could reasonably be expected of him in the circumstances in which he was placed by the action of the *Canada*?

The answer to the first of these questions is in the affirmative, and to the second, that he did everything that he could reasonably be expected to do.

A minor point was also made by the appellants that the *Cape Breton* ought to have given a short-blast signal when the *Canada* first shewed a flash of her green light, and the helm of the *Cape Breton*, it was alleged, was ported slightly, and afterwards steadied so as to bring the vessel back on her course. But to this point the appellants appear to have originally attached no importance, for it is omitted from their preliminary act and statement of claim, and it appears to their Lordships and to the Assessors quite immaterial, for the *Cape Breton* was not altering her course or taking any fresh course, and was only doing what was necessary at the time for the purpose of keeping her proper course on the south side of the channel.

The opinion which their Lordships have formed of this case is substantially in accordance with that entertained by the majority of the judges of the Supreme Court of Canada, and expressed in their judgments, and their Lordships will humbly advise His Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

Solicitors for respondents: *Paines, Blyth & Huxtable.*

[HOUSE OF LORDS.]

POLSUE & ALFIERI, LIMITED . . . . . APPELLANTS;

AND

RUSHMER . . . . . RESPONDENT.

H. L. (E.) 1907 *March* 11.

Nuisance—Trade District—Noisy Neighbourhood—Printing Machinery—Noise, Increase of—Residence—Standard of Comfort—Injunction.

To give a householder a right of injunction against a neighbour for carrying on a noisy business in a trade district the noise must amount to a nuisance, regard being had to the nature and habits of the neighbourhood and to the pre-existing noises.

The decision of the Court of Appeal, [1906] 1 Ch. 234, affirmed upon the facts.

THE respondent had from 1887 carried on the business of a dairyman in Gough Square, Fleet Street, where he resided. The district was specially devoted to the printing and allied trades. The appellants carried on a printing business in a house adjoining the respondent's house. In 1904 the appellants set up machinery which, in the opinion of Warrington J., who tried the case, caused at night-time a serious disturbance to the respondent and his family amounting to a legal nuisance. Warrington J. granted an injunction restraining the appellants from so working their machinery and so carrying on their printing works as by reason of noise to cause a nuisance to the respondent or his family. The Court of Appeal (Vaughan Williams, Stirling and Cozens-Hardy, L.JJ.) affirmed this decision. (1) Hence this appeal.

March 7, 11. *Buckmaster*, *K.C.*, and *Frederick Hinde* (*G. H. Couch* with them), for the appellants. The Courts below have failed to take account of the neighbourhood in which both the appellants' and the respondent's premises are situated. The whole place is given up to the printing and allied trades, and was so long before the respondent in 1887 set up his business. There are other noises than that of the appellants' machinery, which was admitted to be of the best kind possible. No injury to property is alleged, and the distinction has long been recognized

(1) [1906] 1 Ch. 234.

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between injury to property and mere personal inconvenience. It was drawn by Lord Westbury L.C.: "If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop": *St. Helen's Smelting Co.* v. *Tipping*. (1) Lord Cranworth and Lord Wensleydale used language to the same effect. This consideration has been disregarded in the Courts below, and the cases cited were not in point. There is here, for example, no question of prescription. The essence of the matter is locality, and "persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance," as Jessel M.R. said in *Salvin* v. *North Brancepeth Coal Co.* (2); see also the judgment of James L.J. in the same case. The evidence of the respondent's own witnesses shewed that the noise was not great, and that the machinery worked smoothly. One witness, a mechanical engineer, prepared a report for the respondent which the respondent declined to produce. In *Colls* v. *Home and Colonial Stores* (3) Lord Macnaghten said: "I have often wondered why the Court does not more frequently avail itself of the power of calling in a more competent adviser to report to the Court upon the question." If this had been done the result might have been different. The question is one of fact; but the House will not hesitate, if the case requires it, to differ from two concurrent judgments of fact in the Courts below: *Montgomerie & Co.* v. *Wallace-James*. (4)

H. Terrell, K.C., and *C. L. Coote*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, this appeal has been presented to your Lordships with great fairness and propriety; but to my mind it is a hopeless appeal. There is no question of law that I can see in the case. Warrington J. laid down the law quite soundly; nor is it disputed that he did so.

(1) (1865) 11 H. L. C. 642, at p. 650.
(2) (1874) 9 Ch. 705, 706, n.
(3) [1904] A. C. 179, at p. 192.
(4) [1904] A. C. 73.

The law of nuisance undoubtedly is elastic, as was stated by Lord Halsbury in the case of *Colls* v. *Home and Colonial Stores*. (1) He said: "What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." This is a question of fact.

It is said, indeed, by the learned counsel for the appellants that Warrington J. did not carry out his law in the way in which he approached the facts. I cannot see that it is so. There was evidence sufficient to shew that, taking into consideration the character of the locality and the noises there prevailing, yet a serious addition had been caused by the defendants. In my opinion that was quite sufficient to warrant the conclusion arrived at by the learned judge and the Court of Appeal.

I agree with Cozens-Hardy L.J. when he says: "It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked."

My Lords, I think that this appeal wholly fails and that it ought to be dismissed with costs.

LORD MACNAGHTEN. My Lords, I entirely agree.

LORD JAMES OF HEREFORD. My Lords, I also concur.

LORD ROBERTSON. My Lords, I think the judgment is right for the reasons stated by Cozens-Hardy L.J.

(1) [1904] A. C. 179, at p. 185.

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LORD ATKINSON. I also concur for the reasons stated by Cozens-Hardy L.J.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 11, 1907.

Solicitors: *M. W. Stikeman; H. E. Griffith.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 *March* 18.

ASSHETON SMITH AND OTHERS . . . . . APPELLANTS;

AND

OWEN . . . . . RESPONDENT.

Harbour Dues—Port—Limits of Port—Ships loading or unloading Goods within Limits of Port—Fiscal or Customs Port—Commercial or Local Port — Natural Port artificially enlarged — Statute — Construction — 33 Geo. 3, c. cxxiii.—49 Geo. 3, c. xxiv.

By two private Acts trustees were authorized to levy rates and duties upon ships loading or unloading "within the limits of the port of Carnarvon":—

Held that, upon the true construction of the Acts, the words used meant the wider limits of the fiscal port, and not the limits of the local or popularly understood port of Carnarvon.

The decision of the Court of Appeal, [1906] 1 Ch. 179, affirmed.

THIS appeal turned upon the construction of two private Acts and the special circumstances of the case, and not upon any principle of law or construction. The facts and material portions of the Acts are set forth in the report of the decision of the Court of Appeal.

Feb. 25, 26. *P. O. Lawrence, K.C.*, and *Danckwerts, K.C.* (*Peterson, K.C.*, with them), for the appellants.

Warmington, K.C., and *Eldon Bankes, K.C.* (*R. M. Montgomery* with them), for the respondent, were not heard.

The House took time for consideration.

LORD LOREBURN L.C. My Lords, the main question raised in this case is whether or not Port Dinorwic and certain docks,

quays, and wharves there situated are "within the limits of the said port" of Carnarvon as those words are used in the 5th section of a private Act of Parliament passed in 1809. This private Act follows upon and supplements another private Act passed in 1793.

Now, it is admitted that rates and duties have been paid for a long series of years by the late Mr. Assheton Smith and his predecessors in title upon the footing that the places in question were within the said port. But it is now maintained that the words "the limits of the said port" mean the limits of the local or popularly understood port of Carnarvon, and not the wider limits of the fiscal port of Carnarvon. If so, then, as these places are not within the local port, the rates and duties ought not to have been paid and are not now payable.

In my opinion, the words "limits of the said port" mean the limits of the "fiscal port." Those limits were in 1809 already perfectly ascertained by a return of Commissioners dated November 21, 1723, which, pursuant to certain general Acts, settled "the extent, bounds, and limits of the said port." I think the 5th section of the Act of 1809 was worded in accordance with that return, and meant to embrace all the limits therein settled. It is reasonable that it should have been so, for a clause imposing rates and duties presumably refers to some known area. The area of the fiscal port was rigidly ascertained; but the area of the local or popularly understood port is indefinite and unascertained. I agree also with Cozens-Hardy L.J. in thinking that s. 7 of the Act of 1809 confirms this view, and is inconsistent with any other. Nor can I find upon examination of the two private Acts any expressions which are incompatible with the view that rates and duties were to be imposed throughout the fiscal port. I will not go through the sections.

It was argued that in cases of doubt we ought to consider the benefits bestowed by the Act in return for the taxation, and to measure the incidence of the tax by the extent of the benefit. I do not think there really is any doubt here, but if there be, then it seems to me that this argument tells against the appellants. The entire area of the fiscal port derives benefit from the works and services provided for in these two private Acts, the execution

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and maintenance of which is in part, at all events, made possible by the tax which the appellants seek to escape while reaping its fruits.

In regard to the contention of the appellants that the loading and unloading at a dock or quay constructed by excavation by the appellants' predecessors in title on places where there was dry land in 1809 is not loading or unloading within the port as it existed in 1809, I think the point cannot be seriously argued. It seems impossible, for example, to suppose that if a frontager on the Thames chose to excavate some hundreds of feet long and some fifty feet deep of his frontage backward from the river, he could then construct a quay there and claim that in loading and unloading he was outside of the port of London. Yet that is the logical conclusion of the appellants' argument. These places must be in some port, and, in my opinion, are in the port of Carnarvon. Nor, indeed, is any other port suggested.

I am therefore of opinion that this appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD JAMES OF HEREFORD. My Lords, I also agree.

LORD ATKINSON. My Lords, two questions arise for decision in this case. First, what is the true meaning of s. 5, the charging section in a confused and ill-drawn local Act, 49 Geo. 3, c. xxiv., passed in the year 1809, which is in pari materia with an earlier local Act, equally confused and equally ill drawn, the 33 Geo. 3, c. cxxiii., passed in the year 1793, which must be construed together with it? and, second, the question whether the owner of land abutting on the foreshore of a port or harbour in which dues are levied under statutory authority for the loading or unloading of ships who excavates contiguous to this foreshore a dock in his land and also a canal to conduct the water of the harbour into that dock can, by loading and unloading his ship in the dock so constructed, escape the liability to dues? I concur with Stirling and Cozens-Hardy L.JJ. in thinking that these new works must be regarded as an artificial

extension of the port or harbour, and that it would not be consistent, either with common sense or reason, to hold that the person loading and unloading ships within the limits of the extension should escape liability for the appropriate tolls or dues. I therefore dismiss this question from further consideration. There remains the question of the proper construction of the language of the statutes. I concur with the judges of the Court of Appeal in thinking it is a difficult question. As I understood Mr. Danckwerts, he was towards the end of his argument obliged, rather reluctantly, to admit that the expressions "port of Carnarvon" and "harbour of Carnarvon" meant the same thing, namely, the local port of Carnarvon as distinguished from the fiscal port, and, further, that this local port had no defined or ascertained limits.

I gather from the judgment of Vaughan Williams L.J., if I rightly understand it, that he was of opinion that while the word "port" in the charging sections should be construed to include the port of Dinorwic, it did not mean the fiscal port. And after dealing with the payment of dues by Mr. Assheton Smith, his predecessors in title, and others for many years for loading and unloading vessels in Dinorwic, he apparently condensed the reasons for his judgment on this point in the following sentence: "And I think that in the light of this practice, we ought to hold that the words 'within the limits of the said port of Carnarvon' in the sections relating to the loading and unloading of vessels within the limits of the said port, whether those words do or do not extend to the whole customs port, extend at least to an area which covers Port Dinorwic."

The other Lords Justices adopted the construction contended for by the trustees, and held that the word "port" meant the fiscal port, whose limits had been defined by the Commissioners acting under 13 & 14 Car. 2, c. 11.

For myself, I must confess I am unable to form any conception of what the extent or limits of that port must be which is at once larger than the local port, smaller than the fiscal port, and yet extensive enough to include within it the port of Dinorwic. And I am unable to find anything in either of the private Acts to suggest that such a port comes within

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their purview. In the interpretation of these statutes the choice must therefore, I think, lie between the fiscal port and the local port, and in my opinion it has been rightly made in favour of the former.

In the year 1793, the limits of the fiscal port remained as they had been ascertained and defined by the order of the Commissioners of November 21, 1723. The port extended from the Britannia Rock to Aven Hen. The open places for loading and unloading goods within this fiscal port, styled the port of Carnarvon, had been by the same order defined. They are either embraced within the harbour, or local port, or immediately contiguous to it. The first thing that strikes one in looking into the Act of 1793 is this, that the ex-officio members of the body of trustees, constituted for putting the Act in force, are not only the mayor, deputy mayor, and bailiffs of the town and liberty of Carnarvon, but the justices of the peace for the entire county of Carnarvon and the officers whose jurisdiction and authority extended over the entire fiscal port, the collector, comptroller, and surveyor of the customs of the port of Carnarvon (i.e. the fiscal port) for the time being; and that by the fasciculus of sections from 6 to 18 inclusive powers over practically the whole area of the fiscal port such as are usually conferred on port or harbour authorities are given to these trustees. Sect. 8 clearly contemplates the existence of banks and shores existing in the port of Carnarvon upon which buoys and beacons are to be placed, as well as banks and shores leading to the port of Carnarvon. It is impossible, in my opinion, to hold that in this section the words "port of Carnarvon" can be confined to the harbour or local port, more especially when it is remembered that s. 10 evidently contemplates that the harbour should be thoroughly scoured and all obstructions removed from it. Again, s. 9 authorized the erection of a lighthouse at Llandwyn Point, and s. 12 vests in the trustees all the works they may erect in pursuance of the Act, wherever situate, as well as the ground on which these works stand.

The expression "port of Carnarvon" only occurs in three sections of the Act preceding s. 16, namely, the first, second, and eighth. In the first and second it is no doubt part of the

description of an officer, but in the eighth section this is not so. It is there used to denote the geographical limits within which the powers of the trustees can be exercised. The question is, What does the expression "limits of the said port" mean in s. 16, the charging section?

Lord Atkinson.

It is an obviously unnatural mode of construction which would give different meanings to the same expression occurring in several sub-sections of the same section, unless the language used necessitates it. In sub-ss. 2 and 3 a clear distinction is drawn between the operation of "arriving in" or "coming to" the "said port by stress of weather or otherwise" and "passing or sailing through the Menai Straits." It cannot be supposed that it was ever contemplated that a foreign vessel which sailed through the straits should pay 6*d.* or 3*d.* per ton dues, but that a vessel which, driven by stress of weather or for some reason was sailed up the river, was anchored, and lay opposite Dinorwic, and was then sailed out again, never going into the harbour of Carnarvon at all, should pay nothing, or that a vessel which, from stress of weather or for some other cause, anchored and lay inside the bar, but some miles from the harbour, should pay nothing either.

And yet the last-mentioned vessel, if not the former, must escape unless the word "port" as used in sub-s. 2 extends to waters miles above or below the local port. The words used in sub-s. 3 are "coming to" as distinguished from "arriving in," used in the preceding sub-section. I do not think that by reason of this change of language a different meaning can be given to the word "port" in the two sub-sections. It would be irrational to draw such a distinction, since it would necessitate a difference in the treatment to be given to British and foreign vessels. If, then, the words "the said port" cannot be restricted to the local port or harbour in sub-ss. 2 and 3 of s. 16, neither can they be so restricted in sub-ss. 1, 3, 4, and 5 of the same section, in which the phrase "limits of the said port" is consistently used.

If, therefore, the question turned upon the construction of s. 16 of the earlier statute alone, it should, in my opinion, be decided in favour of the contention of the trustees. The next matter to be considered is whether the provisions of the Act of 1809 restrict

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the meaning to be given to the words "the said port" and "the limits of the said port" in s. 16 of the earlier Act.

So far from that, I think ss. 5, 7, 15, 16, 17, and 20 of the Act of 1809 clearly draw a distinction between the word "port" and the word "harbour," and require that a wider meaning should be given to the former word than to the latter. For instance, in s. 15 the words used are "cause to be removed all, every, or any of the rocks at the Swellies or in any other part of the said straits within the said port of Carnarvon for the more safe passage of vessels to and from the said harbour and through the said straits." If that clause would empower the trustees to blast a rock opposite the port of Dinorwic, as unquestionably it was intended that it should, then it could only do so because the rock was within the port of Carnarvon, since it was not situated either at the Swelly or near the harbour.

In s. 5 the words are "or within the limits of the said port," and, as has been pointed out in the Court of Appeal, the only port that had its limits defined was the fiscal port.

Reading these two Acts together, as it is conceded they must be read, I am of opinion that the construction contended for by the trustees is the true construction, that the judgment of the Court of Appeal was right, and that the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed with costs.

Lords' Journals, March 18, 1907.

Solicitors: *Hasties; Rooke & Sons, for C. A. Jones, Carnarvon.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . APPELLANT; H. L. (E.) 1907

AND

LONDON COUNTY COUNCIL AND OTHERS . RESPONDENTS. *March* 19.

Revenue—Income Tax—Charge upon Property in excess of Annual Value—Interest on borrowed Money—Right to deduct and retain Income Tax—Interest "Paid out of Profits or Gains brought into Charge"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *No. IV., r.* 10—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

The London County Council is bound to pay income tax under Sched. A upon the annual value of property occupied by the council, and cannot deduct it out of the amount of income tax which is payable in respect of their Consolidated Stock, and for which the council is bound to account to the Crown.

The decisions of Channell J., [1904] 2 K. B. 635, and of the Court of Appeal, [1905] 2 K. B. 375, reversed.

IN this case the Crown brought an information against the respondents in respect of the year ending March 31, 1901, claiming from the London County Council a sum of 5900*l.* for income tax upon the capital sum of 118,000*l.* The circumstances under which this claim arose are stated in the reports of the decisions of the King's Bench Division (Channell J.) (1) and of the Court of Appeal (Collins M.R., Mathew and Cozens-Hardy L.JJ.) (2), and also in the judgments in this House. Both Courts decided against the Crown. Hence this appeal.

June 22, 25. *Sir Robert Finlay, K.C.*, and *W. Finlay* (*Sir J. Lawson Walton, A.-G.*, with them), for the Crown. The Courts below decided in favour of the respondents, on the ground that otherwise income tax upon the sum of 118,000*l.* would be paid twice. But this is not so. That sum is paid out of rates, and not out of "profits or gains brought into charge": see the Customs and Inland Revenue Act, 1888, s. 24, sub-s. 3. The interest upon 118,000*l.*, parcel of the interest payable to the stockholders, is paid out of rates, and the council must account for the income tax payable upon that sum. The decision of this House in

(1) [1904] 2 K. B. 635. (2) [1905] 2 K. B. 375.

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London County Council v. *Attorney-General* (1) is in favour of the Crown upon the point which arises here. In that case there was merely a set-off of the money deducted by debtors of the council against the money deducted by the council in payment to its creditors. There is no such set-off here, as the council gets no revenue from the 118,000*l.* represented by this land, and must therefore account for the whole difference between these amounts set off against each other without allowance for the tax under Sched. A in respect of the land occupied by them. The question is the same as that decided in favour of the Crown in *Aberdeen Commissioners of Supply* v. *Russell* (2), where municipal buildings charged with income tax under Sched. A were erected with money borrowed on the security of the rates, and the interest payable on the loan was raised out of the rates. It was held by the Court of Session that the whole interest was chargeable with income tax under Sched. D by s. 102 of the Income Tax Act, 1842. The proviso to that section makes it "lawful to charge the proper officer having the management of the accounts with the duty payable on such interest."

Sir Edward Clarke, K.C., and *Dickens, K.C.* (*Ryde* with them), for the respondents. There is, as Lord Macnaghten said in *London County Council* v. *Attorney-General* (1), one tax only, though for convenience it is arranged under different schedules. Tax has already been paid under Sched. A. on the 118,000*l.*, and no claim under Sched. D can be sustained. Otherwise the tax would be paid twice on the same property. The Customs and Inland Revenue Act, 1888, is not a taxing statute, but one of machinery only: see Lord Davey's observations in the former case, pp. 43-44. The proviso to s. 102 is wholly inapplicable, and the Crown does not claim under it. The construction which the Crown seeks to place upon it is wholly inconsistent with the decision of this House in the former case, and would involve double taxation of the same subject.

Sir R. Finlay, K.C., in reply. Sect. 102 is not machinery, but a charging section applying to rates "not chargeable by this Act as profits." [He cited *Mosse* v. *Salt.* (3)]

(1) [1901] A. C. 26.
(2) (1890) 17 R. 942; 2 Tax Cases, 643.
(3) (1863) 32 Beav. 269.

The House took time for consideration.

March 19. LORD LOREBURN L.C. My Lords, the facts of this case are simple. The annual income of the London County Council liable to income tax is 956,000*l.* a year. I take round figures throughout. Part of it, viz., 838,000*l.* a year, consists of rents or other sums which the council receives. The remainder, viz., 118,000*l.*, consists of landed property which the county council occupies. It does not let this latter property, but uses it, and thereby saves the rent it would have to pay if instead of occupying its own property it hired other property for the purpose. Upon all this 956,000*l.* a year the county council has paid income tax.

Upon the other hand, the county council is obliged to pay 1,371,000*l.* annually as interest upon borrowed money due to the holders of Consolidated Stock, and all the property upon which the county council pays income tax is included in the security held by the owners of the stock. Thus the annual value of all the property owned by the county council is less by 415,000*l.* than the interest it has to pay upon its debt. And the annual receipts by the county council from that property shew a still greater deficiency, for the county council receives nothing in cash for that part of its property which it occupies.

Pursuant to the scheme of the Income Tax Acts which require the tax, where possible, to be collected at its source, the county council when it pays 1,371,000*l.* interest to the owners of Consolidated Stock is bound to deduct from the whole of it the amount of income tax due upon it. They have done so, and the question in this case is how much of the income tax so collected by the county council must be handed over to the Crown, and how much it may retain for itself.

It is quite clear, and is not disputed, that in respect of the income tax deducted from the 1,371,000*l.* the county council must account to the Crown for the tax they have collected on 415,000*l.* (the difference between 1,371,000*l.* and 956,000*l.*), because they have received it purely as tax-collectors for the Crown, and cannot pretend that it represents any moneys which have already paid income tax. Again, as to the remaining

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956,000*l.*, the decision of this House in *London County Council* v. *Attorney-General* (1) admittedly applies, and the county council may retain for itself the tax that it has collected upon 838,000*l.* parcel thereof.

All, therefore, that remains in dispute is, whether the tax collected upon the balance, viz., upon 118,000*l.* a year, may be retained by the council or must be accounted for to the Crown?

This sum represents interest paid by the county council to the holders of Consolidated Stock, which is *not* paid out of profits or gains brought into charge. It is paid out of rates. And on the rates which the council pays over to its creditors it is bound by the proviso at the end of s. 102 of the Act of 1842 to deduct the tax and pay it over to the Crown.

It is said that the effect of this conclusion will be to tax the same income twice over. I cannot see this. The county council pays tax on 118,000*l.* annual value of their own land which they occupy. The holders of Consolidated Stock pay tax on 118,000*l.* annual interest of the debt due to them from the county council. It seems to me that the two incomes are different, the persons who receive and enjoy them are different, and the persons who pay income tax on these two incomes respectively are also different.

With the utmost respect to Channell J. and the Court of Appeal, I am unable to arrive at the conclusion which they have reached. I am of opinion that the appeal from their order ought to be allowed, and I move your Lordships accordingly.

Lord Macnaghten. My Lords, the financial position of the London County Council is still much the same as it was at the time of the dispute with the Crown determined in this House in 1900. As stated in that case, the stock known as Metropolitan Consolidated Stock represents moneys borrowed by the Council and their predecessors, the Metropolitan Board of Works. The stock and the dividend upon it and the sums required to form a sinking fund are charged "indifferently" on the whole of the lands, rents, and property belonging to the council, and on the

(1) [1901] A. C. 26.

rates collected under the head of the Metropolitan Consolidated rate which the council are authorized to levy.

For the financial year ending March 31, 1901, the dividend payable on Metropolitan Stock amounted in round figures to 1,371,000*l.* On the other hand, the council received about 851,000*l.* from rents and interest on authorized loans to other public bodies. The balance required to make up the dividend was provided by the Metropolitan Consolidated rate.

In the case of *London County Council* v. *Attorney-General* (1) the question was whether the council were bound to account to the Crown for the whole of the income tax deducted from the dividend on Metropolitan Stock, or only for so much as was attributable to the sum raised by rates. That question was ultimately determined in favour of the council after two adverse decisions.

A further question has now arisen. The council are owners of property which they occupy themselves and use for their statutory purposes. It is valued at 118,000*l.* a year, and assessed at that value under Sched. A. Having paid income tax under Sched. A in respect of this property, the council claim to recoup themselves by retaining an equal amount out of so much of the income tax deducted from the dividend on Metropolitan Stock as is attributable to the sum raised by rates. The Crown brought this information to try the question. Channell J. considered the claim on the part of the council well founded and dismissed the information. The learned judges of the Court of Appeal have upheld his ruling.

I must confess that I do not quite understand the decision. There is no question as to the principles applicable to these income tax cases. Speaking generally, all income is chargeable, but chargeable only once. Income is brought into charge at its source, and the burden is then distributed among the recipients of the income who bear their share in just proportion. The income derived by the council from rents and interest on loans pays income tax by deduction before it comes to their hands. When that income is applied in or towards payment of interest on Metropolitan Stock the burden is shifted. Again, the sum

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which the council's creditors are entitled to receive from rates is chargeable under s. 102 of the Act of 1842. But I cannot understand what the property in the occupation of the council has to do with the matter. It stands apart. It is quite true that this property is charged in favour of the holders of Metropolitan Stock, but the charge is not and never can be operative. It is superseded by the charge on the rates. The "profits and gains" derived from the property in the occupation of the council are charged at their source in the hands of the council under Sched. A. The stream flows no further. It is enjoyed and absorbed by the council. The council must have the use and occupation of some property to enable them to perform their statutory duties. So long as the rates are available to meet the demands of the stockholders the council are secure in the full and beneficial enjoyment of the property they occupy. What possible claim can there be to relief or indemnity as regards income tax in respect of this property?

I cannot help thinking that Channell J. has misapprehended some observations which fell from my noble and learned friend Lord Davey in the case of *London County Council* v. *Attorney-General.* (1) In explaining the principle of taxing income at its source and distributing the burden among the persons who in their turn share and enjoy the income, Lord Davey observes that "it was no doubt considered that the real income of an owner of incumbered property, or of property charged, say, with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity." That is a proposition of the truth of which incumbered owners are, for the most part, painfully conscious. But it proceeds on the assumption that the charge for the interest or for the annuity, as the case may be, is a real burden. If the interest or the annuity is discharged by some person other than the incumbered owner or devisee without recourse to such owner or devisee the burden is nominal. The owner or devisee is practically none the worse for the charge. Take the present case. The property in hand, which is valued at 118,000*l.* a year, has never contributed, and so long as the council use it for their

(1) [1901] A. C. 26.

statutory purposes never will contribute, a single penny towards the payment of interest on Metropolitan Stock. The property in the actual occupation of the council is worth to them, for all practical purposes, just as much as if it were not charged at all.

The learned Master of the Rolls, with whom his two colleagues agreed, follows Channell J. He rests his conclusion on Lord Davey's observations. "It is clear," he says, "from s. 60, No. IV., r. 10, as explained by Lord Davey, that the real income of an owner of incumbered property is the annual income of the property less the interest on the incumbrance." So it is, if the incumbered owner pays the interest out of his own pocket. But the case is different if the interest is discharged from some other source, and the owner is free. His Lordship then goes on to say "the Crown cannot demand the tax twice on the same income. It follows, therefore," he adds, "that the Crown having received income tax once under Sched. A on the full annual value of the property in question can have no possible right to receive it a second time." The answer is, that the Crown does not receive it or claim to receive it a second time. It receives the tax only once. But if the contention on the part of the council were to prevail, there might be taxable income—income plainly taxable—and yet the Crown would receive no tax upon it at all. Let me put the case. I leave out of consideration the property belonging to the council which produces income. That does not affect the question. I will assume the dividend on Metropolitan Stock to be 100,000*l.* a year. Then if the council have no property in their own occupation and the dividend is raised entirely by rates, the Crown gets income tax on the whole of the dividend. But if the council proceed to acquire property for their accommodation the tax on the dividend receivable by the Crown gets less and less until it vanishes altogether, if and when the annual value of the property in hand assessed under Sched. A reaches 100,000*l.* The property itself pays tax under Sched. A, whoever may be the owner and occupier. The point is that the Crown loses the tax on the dividend if the tax when collected goes to recoup the council for what they pay under Sched. A.

In my opinion the Crown is entitled to receive the whole of

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the income tax on the rates applied in or towards the satisfaction of the dividend on Metropolitan Stock.

It seems to me that the judgment of the Court of Appeal must be reversed and an order made on the information for payment of the sum claimed by the Crown, and the council must pay the costs both here and below.

LORD JAMES OF HEREFORD. My Lords, I entertain grave doubts as to the judgments which have been delivered in this case, but they are not strong enough to cause me to dissent from the views which have been expressed by my noble and learned friends. Therefore, I concur in the motion before the House.

LORD ROBERTSON. My Lords, I concur.

LORD ATKINSON. My Lords, I agree.

Order of the Court of Appeal and judgment of Channell J. reversed, with costs here and below: Cause remitted to the King's Bench Division.

Lords' Journals, March, 19, 1907.

Solicitors: *Sir Francis Gore, Solicitor of Inland Revenue; Scager Berry.*

[HOUSE OF LORDS.]

VILLAR . . . . . APPELLANT;

AND

SIR WALTER GILBEY, BARONET . . . . . RESPONDENT.

H. L. (E.) 1907 *March* 19.

Will—Construction—"Born in my Lifetime"—Divesting Clause—Child en Ventre sa Mère.

There is no fixed rule of construction which compels a Court to hold that a child was born in the lifetime of a testator because it was at that time en ventre sa mère. That peculiar rule of construction is limited to cases where that construction of the word "born" is necessary for the benefit of the unborn child, as decided by Lord Westbury L.C. in *Blasson* v. *Blasson*, (1864) 2 D. J. & S. 665.

A testator by his will devised real estate in strict settlement to his brother's first and second sons (who were alive at the date of the will) successively for life, with remainder to their first and other sons in tail, with remainder to his brother's third, fourth, and other sons successively in tail, but declared his intention to be that any third or other son born in the testator's lifetime should not take a larger interest than for life only, with remainder to his issue in tail male. The brother's third son was born three weeks after the testator's death. The first and second sons died without issue:—

Held, that the third son took an estate tail, not having been born in the testator's lifetime.

The decision of the Court of Appeal, [1906] 1 Ch. 583, reversed, and the decision of Swinfen Eady J., [1905] 2 Ch. 301, restored.

THE material facts and provisions of the will are fully set forth in the reports of the decisions below and concisely in the judgment of Lord Loreburn L.C. in this House.

March, 5, 6, 7. *Younger*, *K.C.*, and *Draper*, for the appellant. There is no reason why the words of the will should be construed otherwise than in their plain grammatical meaning. There is no principle of construction by which the words "born in my lifetime" should include posthumous children. The Court of Appeal have introduced questions of public policy and of law, particularly the law against perpetuities, into a matter of mere construction. There is no rigid rule on the subject except the rule in *Shelley's Case*. It is necessary to distinguish between

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cases of construction proper and cases in which a principle of law is involved. The exact words are important—"born in my lifetime." The testator might have added "or in due time afterwards." There are only two cases in the books where a child en ventre sa mère has been held to come under the word "born." The first is *Trower* v. *Butts* (1) and the other *Blasson* v. *Blasson*. (2) The ratio decidendi in both cases was the benefit of the child, and neither has any application when the extended view would be detrimental to the child. In *Blasson* v. *Blasson* (2), where Lord Westbury L.C. varied the decision of Kindersley V.-C., he said "that the child en ventre sa mère is only to be treated as a born child where such a construction is necessary for the benefit of the child." In *Long* v. *Blackall* (3) (a bequest of leaseholds) the literal meaning was adopted and the posthumous child excluded. In *Thellusson* v. *Woodford* (4) the words "born in due time afterwards" were added, and in the House of Lords Lord Chancellor Eldon said (5): "The rule of law has been properly laid down that the time of gestation may be taken both at the beginning and the end." There are no such words here. In *Doe* v. *Lancashire* (6) the question was one not of construction, but of the revocation of a will by the birth of a child; and Grose J. says (7): "I know of no argument founded on law or natural justice in favour of the child who is born during the father's lifetime which does not equally extend to a posthumous child." *Blackburn* v. *Stables* (8) was a case of an executory trust in tail for an only son of A., and Grant M.R. said the words must be taken in their legal acceptation, and the gift was not void for uncertainty or too remote for a child en ventre at the father's death to take. In *In re Wilmer's Trusts* (9) the question was one of perpetuity, not construction.

The "benevolent" construction was adopted in *Millar* v. *Turner* (10), where the gift was to such children as should be living

(1) (1823) 1 S. & S. 181.
(2) (1864) 33 L. J. (Ch.) 403; 2 D. J. & S. 665.
(3) (1797) 3 Ves. 486.
(4) (1805) 11 Ves. 112, affirming the decision below, (1798) 4 Ves. 227.
(5) 11 Ves. at p. 149.
(6) (1792) 5 T. R. 49.
(7) Ibid. at p. 63.
(8) (1814) 2 V. & B. 367, 369.
(9) [1903] 1 Ch. 874, Buckley J.; affirmed [1903] 2 Ch. 411.
(10) (1748) 1 Ves. Sen. 85.

at the time of the father's death, and a posthumous child was included. So *Clarke* v. *Blake* (1), affirmed sub nom. *Doe* v. *Clarke* (2), where it was held that a child en ventre is considered as born "for all purposes which are for his benefit." So *Gibson* v. *Gibson* (3); *Burdet* v. *Hopegood* (4); *Rawlins* v. *Rawlins* (5); *Whitelock* v. *Heddon* (6), which is cited in *Trower* v. *Butts* (7), where potential existence was held to be within the reason of the gift. There the words were "begotten and born," and "begotten" was treated as equivalent to "born." On the same principle was *Musgrave* v. *Parry* (8), where it was held that a child en ventre may be vouched to a recovery, and that a gift "hæredibus de corpore procreatis" includes a gift "de corpore procreandis." The principle of benefit to the unborn child was also applied by Lord Hardwicke in *Wallis* v. *Hodson* (9), where the maxim of the civil law is applied, "posthumus pro nato habetur." In *Thellusson* v. *Woodford* (10) Arden M.R. said that a simple and natural construction ought, if possible, to be adopted. In *Blasson* v. *Blasson* (11) Lord Westbury quoted, "Qui in utero est, perinde ac si in rebus humanis esset custoditur quoties de commodis ipsius partus quæritur." The latter words are significant. On the other hand, in *Northey* v. *Strange* (12) a devise to children and grandchildren was held not to include a posthumous grandchild. The like exclusion was enforced in *Storrs* v. *Benbow* (13), where the words were "to each child that may be born." In *In re Burrows* (14) the gift was "in case she has no issue then living," then over. The posthumous child was held entitled. This was also a case of benefit. So *Pearce* v. *Carrington*. (15) The modern text-books and precedents are in favour of the appellant. In Davidson's Precedents (1880), 3rd ed. vol. 4, p. 391, a proviso excluding children "en ventre sa mère" is described as "probably superfluous."

(1) (1788) 2 Bro. C. C. 319.
(2) (1795) 2 H. Bl. 399.
(3) (1698) 2 Freeman, 223.
(4) (1718) 1 P. Wms. 486.
(5) (1796) 2 Cox, 425.
(6) (1798) 1 Bos. & P. 243.
(7) 1 S. & S. 181.
(8) (1715) 2 Vern. 710.
(9) (1740) 2 Atk. 114.
(10) 11 Ves. 112, affirming the decision below, 4 Ves. 227.
(11) 33 L. J. (Ch.) 403; 2 D. J. & S. 665.
(12) (1716) 1 P. Wms. 340.
(13) (1833) 2 My. & K. 46.
(14) [1895] 2 Ch. 497.
(15) (1873) L. R. 8 Ch. 969.

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Warmington, K.C., and *Micklem, K.C.* (*Wace* with them), for the respondent. The will is a strict settlement of family estates, and discloses a desire to tie up the property for as long a period as possible. No distinction, either in principle or by authority, exists between "born in my lifetime" and "living at my death." It is a rule both of law and construction, in the absence of clear contrary intention, that a child en ventre sa mère, if subsequently born alive, is to be deemed retrospectively to have been born at the specified date, though, of course, no child can take until born. This has been a principle of English law, as it was of the civil law, from the earliest times. Such a child received the protection of guardians, an injunction against waste could be granted on his behalf, and he was regarded as heir; though the qualified heir received the rents during the interval between the ancestor's death and the birth of the child. This has always been the opinion of the profession and of the text writers: Powell on Devises, which was the foundation of Jarman on Wills, vol. 2, p. 325 (ed. of 1827). The rule is stated in *Wallis* v. *Hodson* (1), without qualification, "posthumus pro nato habetur." Lord Hardwicke there treats the question as one of the intention of the donor. The question of benefit to the donee is irrelevant, and introduces doubt and ex post facto considerations. The circumstances vary, but the rule is the same. In *Thellusson* v. *Woodford* (2) Buller J. expressly said—see p. 327—that the rule was not confined to cases of benefit, but prevailed "to all intents and purposes." Eyre C.J. in *Doe* v. *Clarke* (3) cites Lord Loughborough to the same effect. *Reeve* v. *Long* (4), cited in *Thellusson* v. *Woodford* (2) in the House of Lords, states the principle as of universal application, as it is also stated in *Doe* v. *Lancashire* (5) and *Doe* v. *Clarke.* (3) In *Trower* v. *Butts* (6), which has uniformly been accepted for more than seventy years, the rule is stated as invariable. No argument can be founded on slight variations of expression; "born in my lifetime" is synonymous with "living at my death." It is

(1) 2 Atk. 114.
(2) 11 Ves. 112, affirming the decision below, 4 Ves. 227.
(3) 2 H. Bl. 399.
(4) (1694) 1 Salk. 227.
(5) 5 T. R. 49.
(6) 1 S. & S. 181.

certainly singular that between *Burnet* v. *Hopegood* (1) in 1718 and *Blasson* v. *Blasson* (2) in 1864 there should be no authority based on the benefit to the child: see Chitty J.'s judgment in *In re Burrows*. (3) The avoidance of divesting is a general principle not confined to questions of posthumous children. In *Pearce* v. *Carrington* (4) the benefit of the child was not the ground of decision.

The invariable assumption of conveyancers has been that "child" includes a child en ventre sa mère: see Sugden on Powers (ed. 1861), pp. 652-3; Notes to Wms. Saunders (ed. 1845), p. 387, citing *Reeve* v. *Long*; Watkins on Descent, 3rd ed., p. 214; Jarman on Wills, 4th ed., vol. 2, pp. 185, 186.

Younger, *K.C.*, in reply. In most of the authorities the word used has been "living," and an unborn child has been held to be living. In *In re Burrows* (3) the word was "living." In *Blasson* v. *Blasson* (2) Lord Westbury said it was a strain on the conscience of the Court of Chancery to include posthumous children. All the cases between 1718 and 1863 were "living," and not "born." The note referred to in Williams' Saunders dealt with perpetuities, and not construction. Davidson in the edition of 1861, vol. 3, p. 115, suggested that the word "born" might be replaced by "living" or "in esse," so as to include the posthumous children, conceiving that "born" would not include them: see also Martin's Conveyancing (1841), vol. 5, p. 174; and Bythewood & Jarman (1849), vol. 11, p 328.

The House took time for consideration.

March 19. LORD LOREBURN L.C. My Lords, George William Rush made a will in the year 1854, by which he devised certain hereditaments to his brother for life, remainder to his brother's eldest son for life with divers remainders in tail, remainder to his brother's second son for life with remainders in tail, and, in default of such issue, then to the third, fourth, and every other son of his said brother successively and in

(1) 1 P. Wms. 486.
(2) 33 L. J. (Ch.) 403; 2 D. J. & S. 665.
(3) [1895] 2 Ch. 497.
(4) L. R. 8 Ch. 969.

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remainder one after another according to priority of birth and to the heirs of the body of such son or sons. And then follow these words: "But I declare my intention to be that any third or other son or sons of my said brother born in my lifetime shall not take a larger interest in my said estates than for life only with remainder to his issue in tail male and then in tail female," &c.

Now, the third son of the testator's brother is William Beaumaurice Rush, and as events have fallen out he has become entitled to these hereditaments under this will. The only question is whether he is entitled to an estate tail, or is entitled only to an estate for life as having been "born in my" (the testator's) "lifetime." In actual fact the testator died on September 18, 1854, and William Beaumaurice Rush was born on October 9, 1854. If the plain meaning of words is to prevail, it is obvious that William Beaumaurice Rush was not born in the testator's lifetime, and Swinfen Eady J. so held. But the Court of Appeal were of opinion that there is a fixed rule of construction which compels a Court to hold that he was born in the lifetime of the deceased, because at that time he was en ventre sa mère. Everything depends upon whether or not such a rule of construction has been established by the authorities.

It is certain that a child en ventre sa mère is protected by the law, and may even be party to an action. Again, in computing lives for the purpose of the rule against perpetuities, a child en ventre sa mère is taken as if it were actually living. And under the old law, which treated a will made before marriage as revoked by marriage and the subsequent birth of a child, it made no difference whether the child was actually born before the father's death or was still en ventre sa mère at that time. All this is quite true, but I do not think it helps to establish a rule that the words "born in my lifetime" include persons born some weeks or months later. I cannot see what bearing these rules of law have upon the meaning of words used by a testator who can make what dispositions and choose what language he pleases.

Another series of decisions was cited, under which the Courts

held that children en ventre sa mère at the father's death must be included in the description in a will of children "living" at the father's death. From the beginning this construction was acknowledged by the Courts to be in some sense a straining of language, but was justified on the ground that such children came within the motive and reason of the gift, and should therefore be included by a fiction or indulgence, on the ground that it was for their benefit. The civil law was invoked, which authorizes the treatment of posthumous children as though they were living at their father's death when it is for their advantage. And though there are subsequent cases which justify the construction I am now discussing on the ground that children in utero are in fact "living," though unborn (which, if sound, makes all this class of cases wholly immaterial in the present case), the main stream of authorities puts it upon the earlier ground; and it is everywhere stated or assumed that no such construction will be applied unless it is for the benefit of the child. All these cases are valid enough when we are dealing with the words "living at the father's death," but are not helpful, except by analogy, when we are dealing with the words "born during the father's lifetime." For it does not follow that where Courts have attached an unnatural meaning to particular words, and thus made them words of art, a like unnatural meaning must be attached to different words, even though their ordinary or natural sense be very similar.

Two cases remain to be noticed. The first is *Trower* v. *Butts* (1), where a posthumous child was held to be included under the words "born in 'the father's' lifetime." As I read that case the Vice-Chancellor so decided on the ground that this construction was for the child's benefit. The other case is *Blasson* v. *Blasson* (2), in which similar words occurred, and Lord Westbury L.C. upheld the case of *Trower* v. *Butts* (1) on the ground I have just mentioned, and spoke of "this peculiar rule of construction which is limited to cases where such construction of the word 'born' is necessary for the benefit of the unborn child."

Out of these materials the Court of Appeal has deduced a rule

(1) (1823) 1 S. & S. 181. (2) (1864) 2 D. J. & S. 665.

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stated by Cozens-Hardy L.J., as follows: "As a general rule of construction the word 'child' living at or born at a particular date includes a posthumous child, in the absence of any context indicating a contrary intention." It will be observed that this principle is laid down quite broadly and regardless of the circumstance whether the construction is for the benefit of the child or not. The Court of Appeal thought that this distinction had been overruled by authority. When I examine the cases—*Pearce v. Carrington* (1), *In re Burrows* (2), and *In re Wilmer's Trusts* (3)—cited in support of this view, I cannot find that they support it. It seems to me that the sentence I have quoted from Lord Westbury L.C. accurately states the rule and its limitation, and, with the utmost respect to the Court of Appeal, I cannot accept the rule without the limitation, because there is not authority for such a view.

I agree with Mr. Warmington that it may be difficult at times to say when a particular construction is for the benefit of a child. But I am not on that account to extend to all cases a construction which has throughout been applied only to a particular class. Authority may compel us to do violence to the English language, and to say that in some cases a child is born weeks or months before it is brought forth. But in my opinion we ought not to say so, knowing that it is not the fact, unless we are constrained by authority. And we are not so constrained, except where it is for the child's benefit.

Inasmuch as the effect of applying the rule of construction which I have been discussing to the present case would be to reduce the interest of William Beaumarice Rush from an estate tail to a life estate, it would not be for his benefit, but obviously to his prejudice, and the rule therefore has no application.

Accordingly I am of opinion that this appeal prevails, and the judgment of Swinfen Eady J. should be restored.

LORD MACNAGHTEN. My Lords, I have had an opportunity of reading and considering the judgment which has just been delivered by my noble and learned friend on the woolsack and

(1) (1873) L. R. 8 Ch. 969. (2) [1895] 2 Ch. 497.
(3) [1903] 2 Ch. 411.

also the judgment which is about to be delivered by my noble and learned friend Lord Atkinson. I entirely agree in the decision and in the grounds on which it is based.

Lord James of Hereford. My Lords, I entirely agree with the views which have been expressed by my noble and learned friend on the woolsack that the judgment of Lord Westbury, and the dicta which controlled that judgment, ought to prevail in this case. Therefore I think the judgment of the Court of Appeal ought to be reversed.

Lord Robertson. My Lords, I concur, and I should like to add that I have been greatly aided by the admirable argument of Mr. Younger, in which there was not a superfluous word.

Lord Atkinson. My Lords, the question for decision on this appeal is the proper construction to be put upon the words "born in my lifetime" in a particular clause in the will of one George William Rush, dated June 22, 1854, whereby he purported to cut down to a life estate the estate tail he had in the preceding clause given to the third, fourth, and every other son and sons of the body of his brother Alfred Rush successively, this third son of George William Rush, named William Beaumaurice Rush, having been born one month after the death of the testator. In the construction of wills the well-established rule to be observed is "that every word is to have its effect, every word is to be taken according to its natural and common import, and if words of art are used they are to be construed according to their technical sense, unless upon the whole will it is plain that the testator did not so intend": *Thellusson* v. *Woodford*. (1) It can scarcely be contended that the words "born in my lifetime" are terms of art, or that the word "born" does not in its natural and common import mean "brought forth." Yet the Court of Appeal have apparently by a system of induction, not easy to follow, evolved from the consideration of a number of cases dissimilar in character, in each of which a child en ventre sa mère was deemed to have been living before its actual birth, a general rule of construction

(1) (1798) 4 Ves. 329.

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applicable to wills and marriage articles, if not deeds and other instruments, by virtue of which the words "born in my lifetime" are to be treated as prima facie equivalent to "born in my lifetime or within nine months after my decease," so as to cover the case of a child en ventre sa mère, irrespective of the effect such a construction may have on the interest of the child.

With all respect to the Court of Appeal, I cannot think that the conclusion at which they have arrived is warranted by the authorities on which it purports to be based. Mr. Younger, in his most lucid and convincing argument on behalf of the appellant, has referred your Lordships to numerous authorities, ranging from *Gibson* v. *Gibson* (1), decided in 1698, to *In re Wilmer's Trusts.* (2)

He has classified those authorities under four heads—first, those relating to the revocation of wills; secondly, those relating to the construction of the words "life in being" in the rule against perpetuities; thirdly, those in which the question turned on the construction to be put upon the words "leaving children living" at a particular time, or at the happening of a particular event, and other forms of words of like import; and fourthly, those cases in which "born" was used in forms of words somewhat similar to those found in the will under consideration in this case. In the first three classes of cases a child en ventre sa mère was deemed to be alive before the date of its birth, though it had not then any independent existence, and in some of them it was said that when it was born the date of its birth was by a fiction of the law carried back to the earlier time or event. The ground of the decision in the first class of cases was, apparently, this, that it was assumed that a will made by a man when free from the obligations which marriage and paternity imposed must have been made upon a condition that it should not be operative, should not be treated as his will when those obligations were created; that the obligation of paternity arose when the child he had begotten was en ventre sa mère though still unborn; that the condition was then fulfilled, and that the will should, therefore, be taken on the happening of that event to have been revoked.

(1) (1698) 2 Freeman, 223. (2) [1903] 2 Ch. 411.

The origin and growth of the rule of law against perpetuities, based as it is upon public policy, is fully described in *Cadell* v. *Palmer* (1) and *Thellusson* v. *Woodford.* (2) And the cases in class 2 establish this, that in construing the rule a child en ventre may be deemed to be a "life in being," and the period of gestation might be added at both ends of the period of twenty-one years mentioned in the rule, as this trifling prolongation of the period during which property may be tied up did not in any way bring about the mischief against which the rule was directed.

I think Mr. Younger's contention that the authorities grouped in the first and second classes do not touch the question for decision in this case is sound. A passage in the judgment of the then Lord Chancellor in *Wallis* v. *Hodson* (3), in which he says that a child en ventre sa mère "was a person in rerum natura, so that both by the rules of common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime," was much relied upon for the respondent. But that was a case under the Statute of Distributions. The Lord Chancellor proceeded to state that the history of the statute shews that its main object was to make the jurisdiction of the Ecclesiastical Courts more extensive than was allowed by the common law; that Sir J. Jekyll had decided in *Edwards* v. *Freeman* (4) that the Act was to be construed by the civil law, and that nothing was more clear than that the civil law considers a child in its mother's womb as absolutely born to all intents and purposes for the child's benefit. This case seems to me, therefore, to be an authority for the appellant rather than for the respondent. The cases in the third class were decided upon the principle that where such words as "living at my death" or words of like import are used in a will or marriage articles a child en ventre sa mère will be considered as living though it had not at the time an independent existence.

The cases of *Rawlins* v. *Rawlins* (5) and *Whitelock* v. *Heddon* (6) come within this principle, for, though in the former case the

(1) (1833) 1 Cl. & F. 372.
(2) (1798) 4 Ves. 227.
(3) (1740) 2 Atk. 114.
(4) (1727) 2 P. Wms. 441.
(5) (1796) 2 Cox, 425.
(6) (1798) 1 Bos. & P. 243.

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words "children now born or hereafter to be born" immediately preceded the words "and who shall be living at the time of my decease," it was on the latter words the decision turned.

While in the latter case what was really decided was that a gift to "such male issue as John Whitelock shall or may have at the time when John Heddon shall have attained the age of twenty-one years" should in the construction of the will in that case be read as synonymous with a gift to "such son or sons of John Whitelock as should be living when John Heddon attained twenty-one years of age," and that therefore a child then en ventre sa mère and subsequently born alive took. This decision did not turn at all on the earlier words of the will, "begotten and born in lawful matrimony," and the case is no authority whatever for the proposition that the words "born at a particular event" must be held to include a child then en ventre sa mère irrespective of the benefit to be conferred upon the child by that construction.

It would appear to me, therefore, that the only authorities cited which have any direct bearing on the present case are *Trower* v. *Butts* (1), *Blasson* v. *Blasson* (2), and *Pearce* v. *Carrington*. (3)

In the first of these Sir John Leach held that under a bequest to all the children of the testatrix's nephew R. born in the lifetime of the testatrix a child of which the wife of R. was enceinte at the time of the testatrix's death should be included. It will be observed that it was directly for the benefit of the child to adopt that construction. Sir John Leach apparently founded his decision on *Whitelock* v. *Heddon*. (4) It has been urged that he mistook the meaning and effect of the decision in that case and was misled by it.

In the last part of his judgment, however, he says: "Upon the whole, as I am of opinion that, inasmuch as it is adopted as a rule of construction that a child en ventre sa mère is within the intention of a gift to children living at the death of the testator because plainly within the reason and motive of the gift, so a child en ventre sa mère is to be considered within the intention of the gift to children born in the lifetime of the testator because

(1) (1823) 1 S. & S. 181.
(2) (1864) 2 D. J. & S. 665.
(3) (1873) L. R. 8 Ch. 969
(4) 1 Bos. & P. 243.

it is equally within the reason and motive of the gift." I think it is perfectly plain that Sir J. Leach considered that he was only entitled to adopt the construction he did adopt because he thereby secured a benefit to the child en ventre sa mère. It is for this reason, it would appear to me, that Lord Westbury, in *Blasson* v. *Blasson* (1), approved of Sir J. Leach's decision. His words were: "But in my opinion the judgment of Sir J. Leach was right and well warranted by antecedent decisions in our law. The same rule prevails in other systems of jurisprudence." He then proceeds to state what that rule was, namely: "That the fiction or indulgence of the law which treats the unborn child as actually born applies only for the purpose of enabling the unborn child to take a benefit which if born it would be entitled to, and it is limited to cases where de commodis ipsius partus quæritur." It is, I think, clear that he considered that Sir J. Leach acted upon this rule, and that it was the justification for his decision.

I cannot concur in the contention that Lord Westbury's judgment in *Blasson* v. *Blasson* (1) is not a decision on the point involved in this case. In my opinion it is a direct decision that, for the purpose of ascertaining the period of distribution of a fund, the words "born and living at the time of my decease" do not include a child in utero, but that for the purpose of ascertaining who is to participate in the gift they do include such a child, since it is for its benefit to be included.

In *Pearce* v. *Carrington* (2) a gift was made in the earlier part of a will to the testator's daughter for life, and after her decease to her children, who being sons should attain the age of twenty-one, or being a daughter should attain that age or marry, and if she had no such children then over. By a codicil it was directed that if the daughter should be living at the expiration of five years from the death of the testator's wife, and should not then have any child or children, the gift over should at once take effect as if the daughter were dead. The benefit conferred upon the child who was en ventre sa mère at the expiration of the period of five years was the preventing of the divesting of the interest to which he had become entitled under the earlier clause of the will. The decision was based upon the rule laid down by Lord Westbury

(1) 2 D. J. & S. 665. (2) L. R. 8 Ch. 969.

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in *Blasson* v. *Blasson* (1), which was cited in argument, and it was held that the above-mentioned benefit so accruing to the child was sufficient to bring the case within the rule laid down in that authority. Yet in the Court of Appeal this case of *Pearce* v. *Carrington* (2) is relied upon as an authority that the doctrine of benefit no longer applies. It decides precisely the contrary, in my opinion.

Your Lordships were referred to a number of text-books and books of precedents to shew that there was at the date of the will a uniform practice of conveyancers with regard to the form of the words to be employed to reduce the tail estates devised to persons to be born in the testator's lifetime to life tenancies. I think they failed to shew the existence of any such practice. On the contrary Mr. Younger, in his short and most effective reply, established that in the opinion of one eminent conveyancer, at all events, whose work was a high authority at the date of the will, no such technical meaning as that contended for in this case was given to words such as these in question.

On the authority of these three last-mentioned cases, which is not, I think, weakened by the decision in *Storrs* v. *Benbow* (3), I am of opinion that the legal fiction mentioned by Lord Westbury should not be applied to the detriment of William Beaumaurice Rush; that the words of the will must be construed in their natural sense; that the judgment of Swinfen Eady J. was right and should be affirmed, and the appeal be allowed.

Order of the Court of Appeal reversed, and judgment of Swinfen Eady J. restored, with costs here and below.

Lords' Journals, March 19, 1907.

Solicitors: *E. E. Baron Reed, for C. P. Clarke, Taunton; Baileys, Shaw & Gillett.*

(1) (1864) 2 D. J. & S. 665. (2) L. R. 8 Ch. 969.
(3) (1853) 3 D. M. & G. 390.

[HOUSE OF LORDS.]

DA PRATO AND OTHERS . . . . . APPELLANTS; H. L (SC.) 1907

AND

PROVOST, &c., OF PARTICK . . . . . RESPONDENTS. *March* 11.

By-law—Ultra vires—Power of Magistrates to close Shops at 10 P.M.—*Burgh Police (Scotland) Acts*, 1892 (*55 & 56 Vict. c. 55*), *ss.* 316, 318, 380, *and* 1903 (*3 Edw. 7, c. 33*), *s.* 82, *sub-s.* 2.

By s. 380 of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), a penalty is imposed on the occupier of any building for the sale or consumption of provisions or refreshments who opens his premises for business before 5 o'clock in the morning or keeps them open after midnight. By s. 82, sub-s. 1, of the Burgh Police (Scotland) Act, 1903, any building used as an icecream shop must be registered. By s. 82, sub-s. 2, town councils of burghs in Scotland may make by-laws (subject to confirmation of the sheriff and the Secretary for Scotland: s. 318 of the Act of 1892) in regard to the hours of opening and closing of premises registered as icecream shops, "the hours for business not being more restricted than fifteen hours daily."

The defenders, the town council of a burgh, made a by-law by which it was illegal for such premises to be kept open except between 7 o'clock in the morning and 10 o'clock at night:—

Held (affirming the decision of the Second Division of the Court of Session), that the by-law was not ultra vires or unreasonable.

APPEAL from the Second Division of the Court of Session. (1)

In December, 1904, the respondents and defenders, the provost and magistrates of Partick, passed the following by-law:—

"No person registered in terms of section 82 (1.) of the said Burgh Police (Scotland) Act, 1903, to keep or use any house building, part of a building or other premises as an icecream shop or aerated water shop shall keep such premises open or suffer them to be kept open except during the hours between 7 of the clock in the morning and 10 of the clock at night on any day." Then followed a penalty for breach of the by-law.

The by-law was confirmed by the sheriff of Lanarkshire and by the Secretary for Scotland.

In May, 1905, Mansueto Da Prato and others, the appellants, who were vendors of icecream, aerated waters and other refreshments,

(1) (1906) 8 F. 564.

H. L. (Sc.) 1907 — DA PRATO v. PARTICK (PROVOST).

and were registered under s. 82 of the Burgh Police (Scotland) Act, 1903 (1), brought an action against the respondents for reduction of the by-law, averring that it was illegal, incompetent, and ultra vires, and not in accordance with s. 82, sub-s. 2 (2), of the said Act of 1903.

The Lord Ordinary (Lord Ardwall) held that the averments of the appellants were insufficient to support the action. His Lordship considered it was not for the Court to judge whether the by-law was reasonable or unreasonable. He said: "I think all such questions must be held to be left by statute to the decision of the two authorities, without whose consent and concurrence these by-laws cannot be passed, namely, the sheriff of the county and the Secretary for Scotland." On February 27, 1906, the Second Division held that there was nothing oppressive in the by-law, and that it was not ultra vires.

March 11. *J. Crabb Watt, K.C.* (of the Scottish Bar), and *J. Crabb Watt*, for the appellants. The by-law is ultra vires, and not in accordance with the fair reading of the clause under which it was made. Secondly, it was not reasonable, for the statute contemplated the continuance of icecream shops, and the hours chosen for business must be such as to permit icecream dealers to carry on their trade in a reasonable manner. From 1 o'clock in the day to 12 P.M. at night are the hours in which business in an icecream shop is usually done. The by-law therefore deprives the appellants of two of the busiest business hours. Further, the magistrates have not pointed out the evil which they propose to remedy. By s. 380, sub-s. 6, of the Burgh Police (Scotland) Act of 1892 the appellants had a right to keep open from 5 in the morning till 12 at night, and by s. 55 no by-laws are to be made contrary to anything contained in that

(1) By s. 82, sub-s. 1, of the Burgh Police Act, 1903, icecream shops must be registered.

(2) By s. 82, sub-s. 2, of the same Act, s. 316 of the principal Act (the Act of 1892) shall be deemed to confer power on the town council to make by-laws in regard to the hours of opening and closing of premises registered under this section, the hours for business not being more restricted than fifteen hours daily, and the provisions of the principal Act relating to by-laws and the confirmation and enforcement thereof shall apply accordingly."

Act—that is, they shall not be contrary to s. 380. And by s. 82, sub-s. 2, of the Burgh Police (Scotland) Act, 1903, the provisions of the principal Act (the Act of 1892) relating to by-laws are to apply to the Act of 1903. Further, the by-law is in restraint of trade; and the power of the magistrates is to regulate, and not to destroy, trade. As to the Lord Ordinary's dictum, the fact that the by-law was considered and approved by the sheriff and the Secretary for Scotland did not deprive the Courts of their jurisdiction to consider whether it was ultra vires or unreasonable. [They cited *Heap* v. *Burnley Union* (1); *Sharp* v. *Wakefield* (2); *Brown* v. *Local Board of Health, Holyhead* (3); *Rossi* v. *Edinburgh Corporation* (4); *Virgo* v. *Municipal Corporation of Toronto* (5); *Ashley* v. *Magistrates of Rothesay*. (6)]

Thomas Shaw, L.A., and *Talbot, K.C.*, for the respondents, were not heard.

LORD LOREBURN, L.C. My Lords, in this case an Act of Parliament (the Burgh Police (Scotland) Act, 1903) was passed which authorized town councils in Scotland "to make by-laws in regard to the hours of opening and closing of premises registered under the section" of the Act, "the hours for business not being more restricted than fifteen hours daily." Pursuant to that power the authorities of the burgh of Partick made a by-law by which they prescribed that no person so registered in regard to such premises should keep open except during the hours between 7 o'clock in the morning and 10 o'clock at night on any day.

Now it is said, first, that this was ultra vires. For my part I think that this was the very thing which was intended to be within the powers bestowed upon the town council.

It is next said that it is unreasonable. All I can say is, here is a specific discretion with regard to a matter of power conferred upon this authority named in the section, and, when they have exercised their discretion in good faith in regard to it, it seems to me that the Court has no power to interfere.

(1) (1884) 12 Q. B. D. 617.
(2) [1891] A. C. 173.
(3) (1862) 7 L. T. 332.
(4) [1905] A. C. 21.
(5) [1896] A. C. 88.
(6) (1873) 11 M. 708; (1874) 1 R. (H. L.) 14.

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DA PRATO v. PARTICK (PROVOST).

I agree with the opinion of the Lord Justice Clerk which has been read to us. For these reasons, in my opinion this appeal ought to be dismissed with costs.

LORD ASHBOURNE. My Lords, I entirely concur with the opinion which has been expressed by my noble and learned friend the Lord Chancellor.

The Legislature distinctly and deliberately intended to give some increased power, and to give increased power in regard to the selection of the period and the hours during which certain houses might be open. The town council exercised that power. Of course, they might have acted in such a way as to expose themselves to the charge of acting ultra vires and unreasonably, and it might be competent for that to be inquired into if they did so; but I am not satisfied that any case has been at all substantiated to that effect, and I am of opinion that it must now be assumed, on the judgments and on the facts, that they were proceeding within the discretion which has been deliberately conferred upon them. I see no reason at all to question the soundness of the conclusion arrived at by the Courts in Scotland

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD JAMES OF HEREFORD. My Lords, I only wish to add one word to what has been said by my noble and learned friends. In concurring in this judgment I think there are some expressions used by the Lord Ordinary to which assent ought to be given in a modified form. He seems to shut out the power of review to an extent which I think would be dangerous if it were literally accepted. Lord Stormonth-Darling says, if it is clear the by-law exceeds the powers given, then a power to review exists. For instance, in the case referred to by the learned counsel which Lord Coleridge decided — *Heap* v. *Burnley Union* (1)—where a by-law laid it down that no pig should be kept within fifty feet of a dwelling-house, that would prevent any cottager practically from keeping pigs at all, and there the power of review was exercised and the by-law was set aside. In the

(1) 12 Q. B. D. 617.

same way here I think we should be careful to say that we do not shut out the power of review within certain limits. That being so, I assent to the judgment as delivered by Lord Stormonth-Darling in the terms in which he has given it.

Lord Robertson. My Lords, questions of this kind have frequently arisen in the Scottish Courts, and the principles upon which they proceed are identical with those upon which the Courts in this part of the country have proceeded. They are perfectly well ascertained, and I do not think they require declaration.

Lord Atkinson. My Lords, I concur. I think it is perfectly clear upon the construction of the sections and the by-law that the by-law is not ultra vires, and I see nothing to shew that it is unreasonable.

Lord Collins. My Lords, I concur.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, March 11, 1907.

Agents for appellants: *Balfour, Allan & North, for Dove, Lockhart & Smart, S.S.C., Edinburgh; and Borland, King, Shaw & Co., writers, Glasgow.*

Agents for respondents: *Grahames, Currey & Spens, for Simpson & Marwick, W.S., Edinburgh; and Donaldson & Alexander, writers, Glasgow.*

[HOUSE OF LORDS.]

H. L. (Sc.) NISBET . . . . . APPELLANT;

1907

AND

March 13. HAMILTON AND OTHERS . . . . . RESPONDENTS.

Burgh—Street—Fixing Width of existing Street—The Glasgow Building Regulations Act, 1900 (63 & 64 *Vict. c. cl.*).

The Glasgow Building Regulations Act, 1900, makes provision for a register of public streets in Glasgow, and by s. 20 imposes restrictions upon the erection of any building upon ground adjoining any street, and for the purpose enacts that the "width" of any public street shall be the "width" set forth in the register where such width is entered therein. And the width of any public street of which the dimensions are not set forth in the register . . . . shall be fixed by the master of works:—

Held (affirming the decision of seven judges of the Court of Session) that the master of works was bound to fix as the width of a public street the width of the street actually existing.

APPEAL from a judgment of the First Division of the Court of Session, with the assistance of three other judges. (1)

The appellant was Thomas Nisbet, master of works for the city of Glasgow. The respondents and pursuers were Messrs. J. & D. Hamilton, oil refiners, and other proprietors or occupiers of premises in Port Dundas Road, Glasgow. The appeal arose out of the construction to be put upon the Glasgow Building Regulations Act of 1900, and was heard immediately subsequent to the following case in the Court of Session, and that judgment in substance ruled this. The material sections of the Glasgow Act of 1900 in question are given in the judgment of the Lord President (Lord Dunedin) in the Caledonian Railway Company's appeal. (2) It appeared that the master of works of Glasgow, the appellant, in the course of proceedings taken by the respondents for a decree of lining for erection of buildings, &c., fixed the width of Port Dundas Road at seventy-two feet ex adverso the property of the respondents, Messrs. J. & D. Hamilton, and

(1) (1905) 7 F. 1034. (2) See the next case.

he also fixed the centre of the road. The respondents stated that the present width of Port Dundas Road opposite their property was sixty feet, and maintained that the master of works had no power under s. 20 of the Glasgow Regulations of Buildings Act, 1900, to determine that the road should be of greater width than it was; that the adoption of the master of works' determination to widen the said road by the addition of twelve feet on the west side of it would involve the confiscation of private property and would have the effect of shutting up the lights of the respondents' buildings, which were authorized in 1903; that the Dean of Guild Court was authorized to fix the width of the streets under s. 21 of the Act of 1900 to fifty feet, and that Port Dundas Road was already sixty feet; and, further, that the said road was already on the existing register of public streets kept under the Act of 1866. The Dean of Guild Court in 1904 sustained the determination of the master of works and fixed the width of Port Dundas Road at seventy-two feet, but the First Division, with the assistance of three judges, recalled that decision. (1)

1906. Oct. 25, Dec. 3. *Thomas Shaw, L.A.*, and *W. Campbell, D.F.* (with them *M. P. Fraser*), were heard for the appellants.

J. Avon Clyde, K.C., and *W. Hunter, K.C.* (all of the Scottish Bar), were heard for the respondents.

LORD LOREBURN L.C. My Lords, this is an appeal from the decision of the Lords of the First Division along with Lords Kyllachy, Low, and Stormonth-Darling, and it depends upon the construction of the Glasgow Building Regulation Act, 1900. Another case, that of *Caledonian Ry. Co.* v. *Corporation of Glasgow* (2), raised similar questions, and was in effect heard and considered by your Lordships at the same time. It seems to me that the opinions delivered in these two cases by the Lord President cover the whole ground so exhaustively and so clearly that I need do no more than express my entire concurrence in them and in the conclusions to which they lead. I therefore respectfully advise your Lordships to dismiss this appeal with costs.

(1) 7 F. 1034. (2) See the next case.

H. L. (Sc.) 1907 NISBET v. HAMILTON

LORDS MACNAGHTEN, ROBERTSON, and ATKINSON concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, March 13, 1907.

Agents for appellants: *Martin & Leslie, for Campbell & Smith, S.S.C., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Auld & Macdonald, W.S., Edinburgh; Kerr & Barrie, writers, Glasgow; Maclay, Murray, Spens, writers, Glasgow; and James Hutcheson & Sons, writers, Glasgow.*

[HOUSE OF LORDS.]

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CALEDONIAN RAILWAY COMPANY . . . APPELLANTS;

AND

CORPORATION OF CITY OF GLASGOW AND ANOTHER . . . . . RESPONDENTS.

Burgh—Street—Building Regulations—"Width," Meaning of, in respect to existing Streets—Glasgow Building Regulations Act, 1900 (63 & 64 *Vict. c. cl.*).

Sect. 9 of the Glasgow Building Regulations Act, 1900, Part II., which has a general heading "Streets," provides for the formation by the defenders of a "register of public streets," in which are to be entered various particulars as regards all public streets then in existence, and inter alia the "point of commencement and termination" and the "width," and enjoins the marking of such streets, and the area thereof, on an ordnance survey map.

The First Division of the Court of Session and three other judges held that the "width" as used in the Act meant in the case of existing public streets the actual width, and, secondly, that the action of the pursuers raised while the register was in preparation and before the statutory period was exhausted was competent, but premature:—

Held, that the decision of the Court of Session was right, and must be affirmed.

APPEAL from the First Division of the Court of Session, with the assistance of three other judges. (1)

(1) (1905) 7 F. 1020.

The appellants, the Caledonian Railway Company, raised this action against the respondents, the Glasgow Corporation and Mr. Nisbet, Master of Works for the city, for declarator that the respondents were not entitled to insert in the register of public streets prepared under the Glasgow Building Regulations Act of 1900, and in terms of s. 9, sub-s. 2, under the heading "Width of Streets" any entry stating or shewing the width of streets to be greater than the actual width thereof where the railway works or properties of the appellants front or abut on the same.

The register was not completed when the action was brought, but was lying before the sheriff for his sanction. Amongst others the pursuers had appealed to the sheriff under s. 9, sub-s. 2 (*c*), of the statute in respect of entries in the register, and their appeal was pending. The defenders contended that the action was incompetent on the ground that the statute provided a remedy by appeal to the sheriff, and the pursuers had exercised their right of appeal.

The First Division held that the action was competent, but premature. The important sections of the Act are given in the Lord President's judgment, which is given below.

1906. Oct. 25, Dec. 3. *J. Avon Clyde, K.C.*, and *F. T. Cooper, K.C.* (both of the Scottish Bar), were heard for the appellants, and contended that, although the register of streets had not been finally settled, the appellants were entitled to obtain relief from the Courts when the proposed entries in the register were ultra vires.

Thomas Shaw, L.A., W. Campbell, D.F., and *M. P. Fraser* appeared for the respondents.

Lord Loreburn, L.C. My Lords, I have already expressed my concurrence with the judgment of the Lord President in this case (1), and I have nothing to add to it. I think the appeal should be dismissed with costs.

Lords Macnaghten, Robertson, and Atkinson concurred.

Ordered, that the appeal be dismissed with costs.

Lords' Journals, March 13, 1907.

(1) *Vide* judgment in *Nisbet* v. *Hamilton and Others*, ante, p. 158.

H. L. (Sc.) Judgment of the Court of Session, July 19, 1905.

1907

CALEDONIAN RAILWAY v. GLASGOW CORPORATION.

The LORD PRESIDENT (LORD DUNEDIN). In this action, reported to your Lordships by the Lord Ordinary, Lord Low, and heard before seven judges in respect of the intrinsic importance of the case, the Caledonian Railway Company are the pursuers, and the corporation of Glasgow are the defenders. The matter of the controversy is as to certain entries made in the register of streets which the Corporation are bound to cause to be prepared under the provisions of the Glasgow Building Regulations Act of 1900. The action contains declaratory and reductive conclusions. The declaratory conclusions are framed to express what the pursuers conceive to be a just interpretation of the provisions of the Act, and the reductive conclusions are directed against entries which they conceive violate those provisions. I shall presently examine with some minuteness the provisions of the statute, but in the meantime, in order to explain the contention of the pursuers, I shall give a general description of them. Part II. of the Act, which has the general heading "streets," provides by s. 9 for the formation by the defenders of a register of public streets in which are to be entered various particulars as regards the streets, and inter alia the point of commencement and termination and the width. It also enjoins the marking of such streets and the area thereof on an Ordnance Survey map. When completed, the register and map are to be laid in a place where they can be inspected, and notice is to be given in the newspapers that they are there for inspection, and then, if no objection is made, the register and map are deemed conclusively to fix the particulars as aforesaid of every public street. But there is provision for anyone aggrieved going to the sheriff, and the sheriff is, after the expiry of the period of two months, to deal with any appeal on that matter in a summary manner, and his decision is to be final. At first sight, the statement of the width of a street might seem to be a matter of no great moment, but its vital importance really depends on the provisions of a section which follows, namely, s. 20. Now that section, with the marginal note of "Restraining erections within certain distance in streets," provides that "the Dean of Guild shall not, without special consent of the corporation,

grant decree for the erection or re-erection of any building upon ground adjoining any street, unless on the condition that one-half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures, if any, existing thereon." It goes on to say that, "for the purposes of this section, the width of a public street shall be the width set forth in the register where such width is entered therein." The effect of this is that where the width is fixed no proprietor can ever have any building nearer to the street than what I may call the edge of the street as so fixed.

Now, the Caledonian Railway Company aver that, under the guise of fixing the width, the corporation have not had regard to actual width, but have laid down what may be termed an ideal width, totally irrespective of the actual condition of affairs. The averments of the pursuers are as follows in Condescendence 7:— "In the case of the under-named streets set forth in the said Schedule No. 1, the width stated in the register under the heading 'Width of Street,' and coloured on the ordnance survey map relative to the said register referred to in the said sub-s. 2 (*a*) of s. 9 of the said Act, is not the width of the street as it actually exists where the pursuers' railways and works or properties are situated, or where they front or abut thereon." I leave out a passage which is a statement of law and not a statement of fact. "In certain cases the width of street as stated in the register, and shewn on the map, includes not only parts of areas of unbuilt-upon land in front of property belonging to the pursuers, although not actually used as street, but also includes the railways, works, and buildings, and the solum thereof belonging to the pursuers." There then follows a long list of streets in which they say these things have occurred. The interest of the company to raise this action is obvious, because, in view of the provisions of s. 20, which I have already summarised, if the entries in the register are correctly described and are allowed to stand, the moment the Caledonian Railway Company come to erect or re-erect any building they will be bound to surrender large slices of their property, and throw them into the public street without any compensation.

Such being the conclusions of the summons and the averments

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of the pursuers, what is the attitude taken up by the defenders? In limine founding on the provision as to appeal which I have quoted, they say that the action is incompetent. I do not mean to examine the authorities cited upon this matter, because I think that the principle underlying those authorities is not doubtful. So long as the defenders keep within the lines prescribed by the statute, the Court will give effect to the finality clause, and will not interfere by way of a declaratory finding or reduction, but if under the name and guise of statutory proceeding the defenders attempt to do something quite different from what the statute allows, then they are doing an ultra vires act, and no finality clause will or can protect their illegal acting from the restraint of the Supreme Court. Now, I am of opinion that the averment of the pursuers is a good averment, because if the construction of the statute on which it is based is correct, and the allegations are in fact true, then, under the guise of entering width, the defenders are not entering the width at all, but are fixing an ideal street, which by the operation of s. 20 will be turned into a real street the moment the pursuers wish to build, to their great loss and detriment. It therefore becomes of the first importance to see what is the answer of the defenders to the pursuers' averment. The answer of the defenders to the pursuers' averment, which I have quoted in the Condescendence, is as follows: "Admitted that in the case of certain of the streets here specifically enumerated the width in the register under the heading 'Width of Street' is not the width of the street as it actually exists where the pursuers' railways, works, and properties are situated, or where they front or abut thereon. Explained that the width of such streets is in all cases properly entered in accordance with the provisions of the said Act, and particularly of ss. 9, 18, 20, and 21, and that the colouring on the ordnance survey map, relative to the said register, referred to in sub-s. 2 (*a*) of s. 9 of that Act, shews in each case the width of the street as it actually exists opposite the respective properties in those streets. Explained that it is impossible to enter in said register the actual or existing widths of every public street in the city at every point in such streets. In a great number of instances such streets vary in width at numerous

points, and would require as many as one hundred entries for one street." I point out to your Lordships that this is a very peculiar answer. It is entirely negative. It admits that the entry of the streets is not an entry of the actual width, but it does not go on to say upon what view the register has been prepared. I need scarcely say that a mere averment that the widths are properly entered in accordance with the provisions of section so-and-so is really no averment of fact at all. In the course of the discussion I pressed the learned counsel for the defenders again and again to say what was the theory upon which they said that the register was constructed. I cannot say that I was met with any frankness of statement on the matter. Sometimes what one cannot discover in the abstract one can discover in the concrete, and what is left vague in generalization may be made plain in the particular. There is a portion of Buchanan Street which is well known to many of your Lordships, where the street, which for the most of its length is broad, is constricted at the end near Argyle Street. If your Lordships will look at the foot of p. 23 in the schedule annexed to the summons, you will find that the entry in the register as to Buchanan Street is "From Argyle Street to Bath Street, width seventy feet, distance between centre of street and building line thirty-five feet." In other words, that constriction is completely ignored so far as the register is concerned. Now, the ground there in question is very valuable ground, and there is little doubt but that the extent is very considerable; probably, looking at the map, it is not less than sixty or seventy square yards. It needs no speculation to see that the value of that ground in what is certainly one of the very best situations of Glasgow for shops is represented by a very large sum of money. Indeed, we were informed that the corresponding piece on the other side of the street, which was bought by the corporation and then removed, did cost a very large sum of money. When I proceeded to ask the learned counsel if, on the next building or rebuilding of that side of the street, that ground, upon the argument of the defenders, was to be confiscated, Mr. Campbell, who appeared for the defenders, answered that he could not deny that it would then be thrown into the public street, but that he preferred to call it

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"the transference of private property to public uses." When counsel of the eminence of Mr. Campbell makes such a statement on a matter which he well knows is at the root of the whole case (because that was explained to parties at the time this case was sent to the seven judges), I am bound to assume that he makes that statement on instructions, and the result to my mind is, to put it at the very lowest, that I am satisfied that it would not be safe to assume that this register had not been framed with a view in the supposed interests of the public in general to effect this compulsory transference without payment, which plain people are accustomed to call confiscation. I need hardly say that if the proceeding is one warranted by Act of Parliament, your Lordships have nothing to do with the question of whether it is confiscation or not; your duty is to give effect to what the Legislature has ordained. But none the less are you the guardians of justice to private rights, and, as such, entitled closely to scrutinize Acts of Parliament to see whether they have brought about a result so repugnant to the principles on which Acts of Parliament usually proceed. If the doctrine of fortius contra proferentem is to be given effect to at all, it should be given effect to in a case of this sort, where the Act is promoted as a private Bill by a corporation and does not receive the general discussion which ordinary public Acts of Parliament receive.

I accordingly proceed to examine the provisions of the Act. The 9th section is as follows: "Part II.—Streets. Sect. 9 (1.) (*Register of Public Streets*)—'The register of public streets' kept under the Act of 1866, with the additions and alterations made or to be made thereon, shall continue in force until the new register of public streets hereinafter provided for is completed.

"(2.) (A) (*Register and Map of Streets*)—The corporation shall on or before the first day of January in the year one thousand nine hundred and two, or as soon as conveniently may be thereafter, cause a register (hereinafter referred to as the 'register') to be prepared of all the public streets then in existence in the city in which may be entered with regard to each such street—

"(i.) The name;

"(ii.) The situation by reference to numbers or other marks on the map hereinafter mentioned;

"(iii.) The point of commencement and termination;

"(iv.) The width;

"(v.) The distance between the centre of the street and the building line where such building line is fixed by statute decree of the sheriff or the Dean of Guild or any resolution of the corporation under or in pursuance of the provisions of this Act;

"(vi.) The character, whether an ordinary street or a lane or court, and whether formerly a turnpike road, statute labour road, or highway;

"(vii.) Any other particulars which the corporation may prescribe in pursuance of agreements between the corporation and the owners of lands and heritages adjoining to and having a right of access by such street or in pursuance of any decree of the Dean of Guild;

The corporation shall further, on or before the said first day of January in the year one thousand nine hundred and two, or as soon as conveniently may be thereafter, cause the said streets to be marked and the area thereof coloured upon an ordnance survey map (hereinafter referred to as the 'map')." Then follow clauses providing for the lodging of this map and register, objections being made, the appeal to the sheriff, and the deciding by the sheriff in a summary manner, which I need not read at length.

Some aid to the meaning of the section may be taken from certain portions of the interpretation clause—clause 4. In that clause it is stated that "'public street' means any road, street, lane, vennel, wynd, alley, bridge, quay, passage, square, or other place within the city used either by carts or foot-passengers which has been maintained by the corporation, or which is by the Police Acts, or shall hereafter in pursuance thereof, be declared to be a public street."

Further, width is thus defined: "'Width' in relation to street or lane means the width of the carriage-way and foot-pavements taken together."

On s. 9 the following remarks seem to suggest themselves:—

(1.) The said register is prima facie to come in place of the

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register of 1866. Now, the register of 1866 was only a list. It came in place of a still older register, and I am not sure that there was not even an older one before that. The purpose of these older registers was simply to set forth what were public streets in contradistinction to the private streets.

(2.) The register, with its accompanying map, has to be made once for all, and after provisions for corrections it is a completed document.

(3.) The register is to be made of streets then in existence.

(4.) The particulars, other than the width de quo queritur, are de facto particulars describing actual and existing things, not prospective and ideal things. The definition of "width" in the interpretation clause also describes an existing state of circumstances.

(5.) The register and map are not contradictory, but are ancillary documents, the one proceeding by description and the other by delineation. All this points clearly and plainly in one direction, namely, that width, like the other particulars, has reference to an existing state of affairs, and not to an ideal or future state of affairs, however desirable that state of affairs might be. Indeed, on this section the defenders have but little to say. Their only argument on that section is an argument ab inconvenienti; it is embodied in that portion of the averments which I have read, saying that it might require as many as one hundred entries for one street. But see what they say as to the map. They say that although it would be so very difficult, and, indeed, almost impossible, to describe such a street in the register, the colouring on the map shews the width of the street exactly as it exists. I need scarcely point out to your Lordships that in making the map different from the register they seem to me to have gone clean in the teeth of the statute, but at the same time I cannot think that what can be done on a map cannot be done on a register, and I am not in any degree alarmed by the prospect of there being even so many as one hundred entries in one street. After all, the rights of individuals, of whom there may be more than a hundred in a street, are to be very gravely affected in this matter, and I cannot say that it is any argument for the corporation to say that they have neither paper nor time to make one hundred entries in one street.

The strength of the defenders' argument is really not rested on a consideration of the 9th section at all, but is rested on the provisions of ss. 20 and 21, and the reference in s. 21 to s. 18. I would remind your Lordships that s. 20 has the heading of "Restraining erections within certain distance in streets," and I have already read the first portion of the section which prohibits building within half of the street nearest the side where the buildings are to be. But then it goes on thus: "For the purposes of this section, the width of a public street shall be the width set forth in the register where such width is entered therein. And the width of a private street, formed with the authority of the Dean of Guild, shall be the width specified in the decree authorizing the formation or laying out of such street, or the width shewn on the plans on which such decree proceeded. And the width of any public street of which the dimensions are not set forth in the register, and of any private street of which the dimensions are not specified or shewn as aforesaid, shall be fixed by the master of works. And the position of the centre of any such street shall be defined by the master of works with reference to any application which may be made to the Dean of Guild for a lining to erect or re-erect any such building." Sect. 21 says: "Any person deeming himself aggrieved by any determination of the master of works under the immediately preceding section may appeal to the Dean of Guild within fourteen days thereafter, and the Dean of Guild shall thereupon have power to fix such width and define such centre of such street, and in fixing such width the Dean of Guild shall, as far as conveniently may be, have regard to the provisions as to width of streets contained in the section of this Act whereof the marginal note is 'Grounds for refusal to sanction plans of streets.'"

The section of this Act referred to is s. 18. It belongs to a fasciculus of sections which have to do with the laying out of new streets, and it is in these terms: "The Dean of Guild shall not, except with the consent of the corporation, and subject to such conditions, if any, as the corporation may prescribe, grant decree for the formation or laying out of any street—

"(1.) Where the width of such street proposed to be formed or laid out—

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"(A) Is less than fifty feet; or

"(B) Where the width in case of a street the distance of the building lines whereof is at least thirty feet from the centre is less than thirty-six feet; or

"(C) Where the width in case of a street which from the configuration of the ground cannot be built upon except on one side thereof is less than thirty feet."

. . . . .

The grammar of that section makes it nonsense, but I think one can see the meaning of it, and it is this: "(A) Is less than fifty feet; or"—and that is alternatively—"Where the width in case of a street the distance of the building lines whereof is at least thirty feet from the centre is less than thirty-six feet." As it is expressed, the second case would never occur, because it would all come within the first, but I do not see that your Lordships will have any doubt as to the real meaning of that. I need not read the rest of the section, because it does not deal with width at all.

The defenders' argument on these sections can be summarized thus:—The master of works is, in lack of the width in the register, to fix the width and centre of a public street; an appeal is given to the Dean of Guild, from whom at common law there lies an appeal to the Court of Session; if the question was one of mere measurement, such a prolonged appeal would be absurd. "Fix," therefore, means that he is to have a discretion. This is made clear from the terms of s. 21, which, if he was merely to measure, would be unintelligible. Lastly, if he, the Dean of Guild, can do all this when there is no entry in the register, in order to supply that entry, the corporation can do the same in the original register, subject only to the possible correction by the sheriff on the merits, which they say is protection enough. If upon a consideration of s. 9 I come to the conclusion that its construction is not to give a discretion, I confess I should be slow to import into it a distinctly opposite meaning by implication from another section, which prima facie is concerned with other matters and only deals incidentally with the fixing of widths. Obviously the portion of s. 20 as to fixing the width of a public street only applies to a period of interregnum. I have already

pointed out that the register is to be finished once for all. New public streets are not dealt with by s. 20, but are dealt with by s. 11. I do not think that, considering the enormous interests involved in a city of the magnitude of Glasgow, it is at all likely that to all proprietors on the register, in other words, prima facie the whole city, the only appeal in such a matter which is of such vital pecuniary importance should be an appeal to the sheriff, to be dealt with in a summary manner, while to the fortunate few who happen to build before the register is quite complete, and find their property unmarked, you are to give an appeal not only to the Dean of Guild, but also to this Court.

If the sections are inconsistent, I should hold that in this matter s. 9 was the ruling section, but to my mind the sections are not inconsistent, and no such implication as is suggested is to be derived from ss. 20 and 21, for the following reasons:—

(1.) The word "fix" is equivalent to "determine," and is equally applicable to finding a fact as to exercising a discretion;

(2.) There is in truth no absurdity in supposing an appeal in what is called mere measurement. Even in measurement, that is, in stretching and reading a tape, mistakes may occur which would have a serious consequence if stereotyped. But, apart from that, there may be material for real contention as to the terminus a quo and the terminus ad quem. Even the definition of width in the interpretation clause, clear as it is, does not avoid this, because in a city like Glasgow all streets are not accurately defined as to pavement and roadway;

(3.) The words at the end of s. 21, with reference to s. 18, are by themselves hopelessly inappropriate to the fixing of the breadth of an existing street. It would mean the abolition altogether of some of the smaller streets—that is to say, not the abolition of the streets, but the destruction of the houses abutting on the streets. The draughtsman of the sections must have had some glimmering of suspicion that this was so, and he introduced the words "as far as conveniently may be." But, after all, the clause may find application in the solitary instance of a new private street for which the Dean of Guild has granted a decree, which is silent as to dimensions, and the plan, per incuriam or for want of a scale, does not specify the breadth. Such a street

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being new, it might well be subjected to the same conditions as other new streets.

But further, seeing that the fixing of width is only a temporary matter contained in an ancillary provision, I think it is in such a case appropriate to see first what s. 9 means, and then to draw inferences from that as to what is to be done with s. 20. As to inequity of result, though that, I admit, is not conclusive, there can be no doubt, and I need not expatiate on such considerations, but the argument is at least aided by a consideration of these matters. As regards new streets where there is no such inequity (the proprietor being the owner of the whole ground which is being laid out), the corporation have most ample and drastic powers, not conferred by a side wind, but in plain and unambiguous terms. I refer to ss. 17, 18, and 22; but I need not read these sections. They practically make the corporation entirely masters of the situation as to the dimensions of any new street, and they absolutely prohibit anyone from laying out a new street or building opposite a new street without having got the approval of the corporation. Further, if reference is made to the interests of the public, I would refer to the ample powers which are given to the corporation by s. 24, where there is a most drastic power to take land compulsorily without going through the ordinary provisions of a provisional order, but by mere application to the sheriff, and putting in force the compulsory clauses of the Lands Clauses Act, which would enable the corporation to take any land they chose for public improvement, subject of course to always paying compensation.

Such being my interpretation of the Act, I proceed to consider what ought to be done with the action. I have already said that I think the pursuers' averments relevant for reduction; but it is clear, I think, that reduction could not be pronounced without a proof, because, although I have commented unfavourably on the averments made by the defenders, yet it would not be right to reduce the register without being quite sure that it was really in fraudem of the provisions of the Act of Parliament, and amounting in essence to an ultra vires act. But I think there is another objection to the action as it stands, and that is that it is premature. The register is not yet complete; it is only lying before the

sheriff, and the appeals are still undisposed of. Now, if the register so far departs from its proper function as the pursuers say, we cannot assume that the sheriff will not correct it, and it seems to me that to reduce it de plano would be to make that assumption. It is true that the sheriff might go wrong on such a question; but I am entitled to assume that he would take the correct view of the Act, and I am quite sure that, with the loyal adherence to the law as laid down by the Supreme Court which the sheriff has always shewn, he would not set up for himself a construction of the Act different from that which a bench of seven judges has declared to be the true one. I assume that he will approach the question with the view of your Lordships clearly expressed, that width means actual width, not necessarily a measurement of scientific and mathematical accuracy, but a width fixed with regard to actual conditions, and not based on theories as to what would be a public improvement. If he applies that view, his determination will render any such action as this unnecessary. But if, for argument's sake, we assume that the sheriff did not do so, and the register when finished and authenticated contained some deviations from the actual state of matters, then the register would be still open to reduction, because no imprimatur of the sheriff could make intra vires what was an ultra vires act of the corporation.

I am therefore of opinion that the action should be dismissed; but as the defenders have not succeeded in making good their plea of incompetency, and have taken up what I consider an unjustifiable attitude on record, I am of opinion that no expenses should be found due to either party.

Lord Adam, Lord M'Laren, Lord Kinnear, Lord Kyllachy, Lord Stormonth-Darling, and Lord Low concurred.

Agents for appellants: *Grahames, Currey, & Spens, for Hope, Todd, & Kirk, W.S., Edinburgh, and H. B. Neave, Glasgow.*

Agents for respondents: *Martin & Leslie, for Campbell & Smith, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1906
Nov. 20
1907
Feb. 14.

In re VAN GELDER'S PATENTS. *Ex parte* THOMPSON.

Petition by Assignee of Patents—Inventor dead—Prolongation refused.

Where it appeared that the patented invention had no exceptional merit and involved no new principle, that the assignee of the patents had neither by himself nor his agents displayed suitable energy and business capacity in pushing them, and that the inventor was dead and could not possibly, if living, have derived advantage from their extension:—

Held, that their prolongation must be refused.

THIS was a petition for the prolongation of two patents granted to Van Gelder in 1892, and assigned to the petitioner in 1893. They related to improvements in machines for freeing air and other gases from dust. The principal use of the patented inventions was for cleansing the air of mills and factories. They were described as (1.) an invention of improvements in or appertaining to machines for separating dust or like particles from air or other gases; (2.) an invention of improvements in or appertaining to apparatus for separating dust or other finely divided solid material from air or other gases. The petitioner alleged that he had given much time and labour and expended considerable sums of money in trying to get the patented inventions manufactured and introduced into practical use, that he had not received any adequate return from his outlay, and that it was only during the last three years that the use of them became established and extended.

The *Petitioner* appeared in person.

The Attorney-General (*Sir J. Lawson Walton*) and *Rowlett*, for the Crown.

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The reasons for the report of their Lordships were delivered by

LORD MACNAGHTEN. This was a petition for the prolongation of two patents, Nos. 21,218 and 22,919 of 1892. They were granted to one Pieter Van Gelder. In 1893 Van Gelder assigned them

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD ATKINSON.

absolutely to Mr. William Phillips Thompson, a patent agent. Mr. Thompson was the sole petitioner, and conducted his case before this board in person.

At the close of the argument their Lordships intimated that they were unable to recommend His Majesty to grant any extension of the two patents or either of them. And they have so reported. It only remains for them now to state the reasons for their repor

The invention for which the patents were granted related to improvements in machines for cleansing air by removing dust and other impurities. Some process of the sort seems to be of vital importance in flour mills, and of use more or less in other mills and factories.

The old method was to strain or filter the dust-laden air through cloth or some textile fabric, but the filtering medium, whatever it was, speedily got choked by the stive or dust, and required constant attention and frequent changing.

The original invention, or "Pioneer patent," as Mr. Thompson called it, on which Van Gelder's improvements were engrafted, came from the United States of America. It was patented in this country in 1886 as "a communication from abroad by the Knickerbocker Company of Jackson, Michigan, U.S.A." The Knickerbocker machines, which were known as the "Cyclone," consisted of a conical or tapering chamber, into which, near the top, the air was admitted tangentially, and so created a vortex. The idea was that the dust would gather on the sides of the cone, fall to the bottom, and pass out into a receptacle below, while the purified air was to escape at the point or apex of the cone. The Cyclone, however, according to Mr. Thompson's statement, though a great advance on the old methods, did its work imperfectly. The air passing out through the cone was by no means free from impurities, and a second apartment or stive-room was required as a settling chamber before the air became fit to be discharged into the open. But the great objection to the Cyclone, according to Mr. Thompson, was its excessive height in proportion to its diameter at its base. It had to be carried up through several floors or stories, and so occupied space which otherwise might have been more profitably employed.

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Van Gelder's attention was first called to the Cyclone by some millers in Chester who had got the Cyclone and employed him to suggest improvements in it. After several experiments and modifications he came to the conclusion that a cone or tapering chamber was not necessary, and that a better result might be obtained by the use of a polygonal prism. To carry out his ideas, in which Mr. Thompson claims to have assisted him with suggestions as well as with money, he took out several patents. To distinguish his type of machine from the Cyclone without losing such advantage as might flow from the apparent similarity of action, he called his invention "the Tornado." But he very quickly found himself involved in litigation with a Mr. Simon, who had acquired the Cyclone patent and was pushing it vigorously. The result was that Van Gelder had to submit to a perpetual injunction with costs. Then Van Gelder, with Mr. Thompson's assistance, took out the two patents which were the subject of this application. Mr. Thompson insisted in his address to their Lordships that a machine made according to these patents could not possibly be held an infringement of the Cyclone patent. Still he admitted that there was a suspicion of infringement about the Tornado which was one cause of its want of success on the market.

Before anything was done under the patents of 1892 Van Gelder became bankrupt. Mr. Thompson was his principal creditor. He paid off the other creditors and took an absolute assignment. In 1894 he granted an exclusive licence to Van Gelder. That arrangement, however, did not prove remunerative. Van Gelder again got into difficulties. He made an assignment in favour of his creditors and went to Australia. There he died a bankrupt about three years ago—so it was stated by Mr. Thompson. When Van Gelder was disposed of Mr. Thompson granted an exclusive licence to one Sutcliffe, who had been Van Gelder's manufacturer. But he did little better than Van Gelder. Mr. Thompson settled with him on the terms of being paid his advances with 5 per cent. interest, giving up his claim to any money due for licences. Then, on March 26, 1901, Mr. Thompson granted an exclusive licence to Messrs. T. Robinson & Sons, Limited, a firm of manufacturers and mill

furnishers of high standing. At that time the Cyclone patent had expired, and the coast was clear. Simon was no longer to be dreaded. But Messrs. Robinson were very slack in pushing the invention. They never issued a single advertisement, and what was worse in Mr. Thompson's view, whenever they furnished a mill with a Tornado, they put their names on it upon a large brass plate, which for some reason or other millers, according to Mr. Thompson, did not like at all. Mr. Thompson did not interfere or even remonstrate with Messrs. Robinson. Their licence, it seems, contained a clause empowering Mr. Thompson to terminate the arrangement with them on a year's notice. But Mr. Thompson never thought of putting pressure upon them or taking the business out of their hands. In fact, as he told their Lordships very candidly, it was not until about two months before the petition came on for hearing that it occurred to him that he had any power of interfering. He had forgotten all about the clause which he had inserted for his own protection. He was a professional man in a large way of business and had no time to attend to such a matter.

That Mr. Thompson has lost pecuniarily by his connection with Van Gelder, and that his speculation has turned out badly, is plain enough on the face of the accounts.

In these circumstances Mr. Thompson asked for a prolongation of the two patents of 1892 in order to recoup his losses.

It is obvious that there are several objections to the application, any one of which by itself would be fatal.

The principal objection is that the invention as explained by Mr. Thompson has not that exceptional merit which would justify their Lordships in recommending a prolongation. The merit which entitles a patentee who has been insufficiently remunerated to claim an extension is different in kind and degree from that which is enough to sustain a patent. In the present case no new principle is involved. There is nothing that can be called real invention. Indeed, it would seem that any workman of ordinary skill having his attention called to a Cyclone machine, and being told that its height was a serious inconvenience, might by a few practical experiments, requiring little thought and little expenditure, have arrived at the same conclusion as Van Gelder.

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It is not perhaps otherwise than significant that Mr. Thompson, who is a patent agent, and does not pretend to be an inventor, claimed at the Bar that he was substantially the inventor of the Tornado, and that its final development was due as much to his suggestions as to Van Gelder's inventive faculty.

In the next place, there has been little energy and not much businesslike capacity displayed in pushing the invention, assuming that it was ever worth pushing. It matters little whether the fault lay with Mr. Thompson or the people Mr. Thompson employed. Certainly Mr. Thompson shewed himself singularly remiss in his dealings with Messrs. Robinson. Whether the invention possesses the advantages which Mr. Thompson attributes to it is another question. The conduct of Messrs. Robinson is rather remarkable. So is the fact that Simon, who was represented by Mr. Thompson as a bitter and watchful enemy of the Tornado, never took action in the case of machines made in accordance with the patents of 1892. Then there is the fact that the company which succeeded to Simon's business shewed no inclination to take up the Tornado when Mr. Thompson approached them in reference to the matter, and there is the circumstance that the Cyclone has been so modified in shape that, according to Mr. Thompson, it is rather an infringement of the Tornado than the Tornado of it. These considerations tend to shew that, after all, the Tornado is perhaps not quite so valuable or important an invention as Mr. Thompson supposes it to be.

Lastly, so far as their Lordships are aware, there is no case to be found in which a prolongation has been granted when the inventor is dead, and could not possibly have derived any advantage from the extension if he had been alive.

For these reasons their Lordships humbly advised His Majesty that the petition should be dismissed.

Solicitors for petitioner: *James, Mellor & Coleman.*
Solicitor for the Crown: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

COMMISSIONERS OF TAXATION FOR THE STATE OF NEW SOUTH WALES } APPELLANTS;

AND

PALMER AND OTHERS . . . . . RESPONDENTS.

J. C.*
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Dec. 17.
1907
Feb. 8.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Bankruptcy Act, 1898—*Administration of Bankrupt's Estate —Priority of the Crown.*

Held, that in the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1898, the Crown is entitled to preferential payment over all other creditors.

APPEAL by special leave from an order of the Supreme Court (May 4, 1905), affirming by a majority a decision of the judge in bankruptcy (November 17, 1904), who had dismissed an appeal from the registrar.

The question involved was whether, in the administration of the assets of a bankrupt under the New South Wales Bankruptcy Act, 1898, and having regard to its actual provisions in respect of distribution and preferential claims, the registrar and the Courts below were right in rejecting the claim of the Crown for preferential payment over all other creditors in respect of the sum of 53*l.* for land and income tax and fines, being a debt payable to the Crown by virtue of the Land and Income Tax Assessment Act, 1895, and Acts amending the same.

The Supreme Court overruled the claim of the Crown, the Chief Justice concluding his judgment as follows: "In this case no extent issued, but the Crown proved in the bankruptcy. This the Crown had a right to do, but, coming under the Act, the debt due to the Crown not being given any preference, they come in the same class as the general body of creditors, and if there were anything to distribute amongst the creditors that must be

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD ATKINSON.

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distributed pari passu. In the case of *In re Henley & Co.* (1), there being no alteration of ownership of the property, the Crown, as a matter of course, took in priority to the other creditors, and whether this was brought about by the issue of a writ of extent or by arrangement with the liquidators is, in my opinion, of no moment, and has no bearing upon the case we have to consider. The case of *In re Baynes* (2), before the Supreme Court of Queensland, and the case of *Clarkson* v. *Attorney-General of Canada* (3), fully support the view I have taken. I am accordingly of opinion that the appeal should be dismissed with costs."

Sir R. Finlay, K.C., Wise (*K.C.* of New South Wales Bar), and *Vaughan Hawkins*, for the appellants, referred to ss. 10, 48, 49, 50, 69, 71 and 72 of the above Act, and contended the Crown was, by virtue of its prerogative, entitled to the priority claimed: see Coke, 1st Inst. 131b. That claim must be upheld unless such prerogative right of prior payment has been taken away by express and unambiguous terms of statutory enactment. The Act of 1898 does not expressly do so, nor does it contain any provisions which may be construed as purporting to do so. Accordingly the prerogative right to payment in priority extends to assets in course of administration under that Act, for it had not been either abandoned or taken away. Reference was made to Williams on Bankruptcy Practice (8th ed.), p. 155; the English Preferential Payments in Bankruptcy Act, 1888, c. 62, s. 1, and the English Bankruptcy Act, 1883, s. 150; *In re Oriental Bank Corporation* (4); *In re Henley & Co.* (1); *In re Bonham* (5); Chitty on Prerogative, pp. 265, 266, 271, *Attorney-General* v. *Leonard* (6), citing *Rex* v. *Wells* (7); *In re Galvin* (8); *In re Corley* (9); *In re Baynes* (2); *Clarkson* v. *Attorney-General of Canada* (3); *Reg.* v. *Bank of Nova Scotia* (10); *Ex parte Temple* (11); *Wydown's Case.* (12)

(1) (1878) 9 Ch. D. 469.
(2) (1898) 9 Queensland L. J. 33.
(3) (1888) 15 Ont. 632; on appeal, 16 Ont. A. R. 202.
(4) (1884) 28 Ch. D. 634, 640.
(5) (1879) 10 Ch. D. 595.
(6) (1888) 38 Ch. D. 622.
(7) (1807) 16 East, 278 (note).
(8) [1897] 1 Ir. Ch. D. 520.
(9) (1889) 23 Ir. Ch. D. 249.
(10) (1885) 1 Can. Sup. Ct. 1.
(11) (1814) 2 Ves. & B. 391.
(12) (1807) 14 Ves. 89.

Foote, K.C., and *Hansell*, for the respondent Palmer, referred to the Act of 1898, ss. 5, 10, 44, 48, 50 and 54, and contended that the prerogative right to priority of payment does not extend to assets in course of administration under that Act. *In re Henley* (1), relied on by the appellants, is distinguishable; it was a winding-up case, not a bankruptcy. They referred to *Ex parte Mavor.* (2) No question arises here as to whether the Crown is bound by a statute; the issue is as to what the Act of 1898 on its true construction intended. They referred to *King* v. *Cotton.* (3) The limitation of the right of the Crown to preferential payment is that it only continues so long as the title to the assets out of which payment is to be made is in the debtor: see *Reg.* v. *Edwards* (4); *The Zoe.* (5) In this case the bankrupt's property was vested in the official assignee before the Crown took steps to enforce payment of its debt, and its preferential right ceased at the moment the property so vested. It moreover elected to prove in the bankruptcy, and thereby submitted to the provisions of the Act. Under those provisions the Crown in the circumstances was only entitled to rank pari passu with other creditors after preferential debts named in the Act had been satisfied. The Act virtually repealed the prerogative right to priority, and postponed its claim to those creditors who had gained thereby a statutory priority.

Wise, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal by special leave from a judgment or order of the Full Court of New South Wales, affirming by a majority of two judges to one a decision of the judge in bankruptcy.

The only question involved is whether in the case of the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1898, the Crown is entitled to preferential payment over all other creditors.

(1) 9 Ch. D. 469.
(2) (1815) 19 Ves. 538, 541.
(3) (1750) Parker, Rep. 112, 126, 127.
(4) (1853) 23 L. J. (Ex.) 42 and 165; S. C. 9 Exch. 32, 628.
(5) (1886) 11 P. D. 72.

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In *Rex* v. *Wells* (1), in a passage which has been often cited, Macdonald C.B. says (2): "I take it to be an incontrovertible rule of law that where the King's and the subject's title concur the King's shall be preferred." Except so far as the Legislature has thought fit to interfere, the rule is one of universal application, and perhaps not unreasonable, when it is considered that, after all, it only means that the interests of individuals are to be postponed to the interests of the community. The rule is enunciated by Lord Coke in *Quick's Case*. (3) From Lord Coke's time to the present day it has never been questioned as a rule of law, and, so far as their Lordships are aware, there has never been any attempt on the part of any Court to limit the generality of its application except in the present case, and in two recent cases in the Colonies which will be referred to presently.

By the Bankruptcy Act of 1898 the estate of the bankrupt is vested in an official assignee: s. 10. It is one of the duties of the official assignee to present to the Court for confirmation a plan for the distribution of the assets: s. 69. Before the plan is confirmed "the bankrupt and any party interested in the estate, and any creditor," may within the prescribed time enter an objection in writing with the registrar, and the Court upon hearing the parties may make such order as it thinks fit: s. 71, sub-ss. 1, 3. The Court has "full powers to decide all questions of priorities and all questions whatsoever whether at law or in equity or of fact in any case of bankruptcy coming within the cognizance of the Court or which it may deem expedient or necessary to decide for the purpose of doing complete justice or making complete distribution of property in any such case": s. 134, sub-s. 1.

The Act also provides that if the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the assignee, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as may be just: s. 96.

The Bankruptcy Act of 1898 gives a preference to certain

(1) 16 East, 278. (2) Ibid. at p. 282.
(3) 9 Rep. 129b.

specified debts, not including among them or referring in any way to debts due to the Crown, and declares that, subject to the provisions of the Act, all debts proved in the bankruptcy shall be paid pari passu (s. 48 (1), (4)).

The Act, though it follows closely the English Bankruptcy Act, 1883, and adopts almost all its provisions, does not contain any section corresponding with s. 150 in the English Act, which declares that save as therein provided the provisions of the Act "relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown."

According to the evidence before their Lordships it was the practice in New South Wales until the present case occurred for the assignee in his plan for the distribution of the assets to make provision for the preferential payment of Crown debts. It is stated that prior to 1895 Crown debts were so paid without further verification than a letter from the Crown solicitor, but that since that time, in accordance with the directions of the late Manning J., claims on behalf of the Crown have been verified by the statutory declaration of a responsible officer of the Crown Department concerned who may have knowledge of the matter.

In the present case the claim on the part of the Crown was notified and verified in the usual manner. A plan of distribution was presented which did not provide for the preferential claim of the Crown. On objection being made, the Registrar refused to alter the plan. His decision was affirmed by the judge in bankruptcy, and on appeal by the full Court, Simpson J. dissenting.

It can hardly be disputed that in the present case the rights of the Crown and the rights of ordinary creditors or "common persons" (as the phrase is in the old cases) do concur or come into competition. It is admitted that the Bankruptcy Act, 1898, does not bind the Crown. It would therefore seem, on principle, that in the administration of the assets under the direction of the Court it was the duty of the Court to give effect to the Crown's prerogative.

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As regards authority both in England and Ireland, the highest Courts in the country, short of the House of Lords, have upheld the prerogative of the Crown. The judgment of the Court of Appeal in *In re Henley & Co.* (1) seems to their Lordships, as it did to Simpson J., to be clear upon the point. The decision was rested upon two separate grounds and upon two distinct prerogatives. It was a case of winding up, not of bankruptcy. The property had not passed out of the Company. The Court therefore held that the Crown was still at liberty to pursue its extreme rights against the Company's property and was on that ground entitled to priority. But the Court also held that under the other and wider prerogative the claim of the Crown must prevail. "If the matter," said James L.J. (2), "is treated as a matter solely of administration of assets under the direction of the Court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid." The other members of the Court, Brett and Cotton L.JJ., also rested their decision on both grounds separately. The reasons of the Lords Justices founded on the wider prerogative are summarily dismissed in the full Court as judicial dicta inapplicable to a case where the narrower prerogative is no longer capable of being exercised, though the assets are still under the direction of the Court vested in a public officer who has no beneficial interest in them. Of course, if that view be correct, the observations in *Henley's Case* (1) to which Simpson J. deferred were wholly idle and irrelevant. But it is impossible to treat a proposition which the Court declares to be a distinct and sufficient ground for its decision as a mere dictum, simply because there is also another ground stated upon which, standing alone, the case might have been determined. It is equally impossible to suppose that the very learned judges who formed the Court, and who were beyond all others familiar with the law of bankruptcy, pronounced a judgment apparently

(1) 9 Ch. D. 469. (2) 9 Ch. D. 481.

unqualified and unrestricted in its application, yet "with the tacit exception of administration in bankruptcy," as suggested by Griffith C.J. in the case of *In re Baynes*. (1)

The judgment of the Court of Appeal in Ireland in *In re Galvin* (2) was a case in bankruptcy, and it is to the same effect. The Court there was composed of Ashbourne L.C., Palles C.B., and FitzGibbon and Walker L.JJ., and the judgment of the Court was delivered by the Chief Baron, one of the most learned and accurate judges on the Bench.

It is difficult to understand the suggestion made in the Court below that, because the Crown puts forward its claim to priority in the case of the administration of a bankrupt's estate, it must therefore be held to have abandoned an undoubted prerogative on which it is actually at the time insisting, and to have elected to come in with the ordinary creditors.

The attention of their Lordships was called to the case of *In re Baynes* (1), which has already been mentioned, and a case in Ontario, *Clarkson* v. *Attorney-General of Canada* (3), in both of which the right of the Crown to preferential payment out of assets being administered in bankruptcy was denied. Their Lordships have carefully considered those cases. With every respect to the Courts by which they were decided, their Lordships cannot help thinking that in both cases the learned judges have not sufficiently kept distinct the two prerogatives which formed separate grounds of decision in *In re Henley & Co.* (4) The judgments are devoted in a great measure to a consideration of the prerogative under which the Crown was entitled to peculiar remedies against the debtor and his property, and of the law and the authorities bearing upon it. The principle upon which that prerogative depends is not to be confounded with the principle invoked in the present case. The prerogative, the benefit of which the Crown is now claiming, depends, as explained by Macdonald C.B. in *The King* v. *Wells* (5), upon a principle "perfectly distinct . . . . and far more general, determining a preference in favour of the Crown in all cases and touching all

(1) 9 Queensland L. J. 33, at p. 44.
(2) [1897] 1 I. R. 520.
(3) 15 Ont. Rep. 632; 16 Ont. App. Rep. 202.
(4) 9 Ch. D. 469.
(5) 16 East, 278.

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rights of what kind soever where the Crown's and the subject's right concur and so come into competition."

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the plan of distribution should be altered so as to provide for the preferential right of the Crown, and that the orders of the Registrar, the judge in bankruptcy, and the full Court should be discharged except as to costs.

Under the special circumstances their Lordships do not propose to advise His Majesty that the existing orders as to costs should be disturbed.

The appellants, in accordance with the undertaking given when special leave to appeal was granted, will pay the costs of the first respondent, who alone defended the appeal, as between solicitor and client.

Solicitors for appellants: *George M. Light & Fulton.*
Solicitors for respondent Palmer: *Church, Adams & Prior.*

[PRIVY COUNCIL.]

J. C.* 1906 *Dec.* 18, 19. 1907 *Feb.* 7.

THE VILANDER CONCESSIONS SYNDICATE PLAINTIFFS;

AND

THE GOVERNMENT OF THE COLONY OF THE CAPE OF GOOD HOPE . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

British Bechuanaland Concession Court—Concessions by Native Chiefs before 1891—*Proclamations of April* 25, 1889, *and February* 1, 1893—*Power of Court to modify Concession.*

Sect. 23 of the proclamation of February 1, 1893, establishing the British Bechuanaland Concession Court, empowers that Court to modify the terms, conditions and scope of all concessions made by native chiefs prior to 1891; or to impose equitable limitations, restrictions or conditions upon their exercise.

A concession by a native chief in Bechuanaland in 1889 and 1890, applicable to all minerals whatsoever, was in effect confirmed by the

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* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD ATKINSON.

said Court, subject to the restriction imposed by the proclamation of April 25, 1889, which related solely to the precious metals, and in effect destroyed the appellants' right thereto :—

Held, that this was a modification within the powers of the Court and not an extinction of the conceded rights.

APPEAL from a judgment of the Supreme Court in Appeal (June 19, 1905), affirming a judgment of the same Court (March 7, 1905).

The action was for a declaration of the appellants' rights under two concessions of mining rights, dated November 22, 1889, and April 10, 1890, granted to their predecessor in title, Adolph Heinrich Carstensen, by David Vilander, the then independent though protected ruler of certain territory known as Bechuanaland and the Kalahari. The said territory was annexed in 1891 to that part of the British Empire known as British Bechuanaland.

By the first of these agreements Vilander gave, under certain conditions, to Carstensen a mining concession to search for and win precious stones, gold, silver, platinum, and other minerals over and in one or more area or areas not to exceed in the aggregate twenty miles square or four hundred square miles to be chosen by the grantee.

By the second Vilander extended this concession to the whole of his territory.

On May 5, 1891, by Proclamation No. 106, B.B., 1891, Her Majesty's sovereignty was proclaimed over the territory to the west of British Bechuanaland known as Bechuanaland and the Kalahari, in which territory referred to in this case was included, and by Proclamation No. 120, B.B., 1891, provision was made that the law of British Bechuanaland should be in force therein.

Subsequently, on February 1, 1893, the British Bechuanaland Concessions Court was established by proclamation of that date, with power to inquire into and decide upon the validity and scope of all claims founded upon grants of land, or mineral or other concessions alleged to have been before May 5, 1891, acquired from native chiefs or other persons in respect of the territory to which the said concessions referred.

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This Court, on December 7, 1893, approved the entire claim of Carstensen, subject to all laws and regulations of British Bechuanaland relating to mines and minerals and otherwise in force in the said territory. Those laws and regulations, so far as material to this appeal, were then contained in the proclamation of April 25, 1889, amended by No. 102, B.B., 1891, making provision for prospecting and mining for the precious minerals, gold, silver and platinum, in the territory of British Bechuanaland, and in the laws and ordinances of the Colony of the Cape of Good Hope, especially Act No. 19 of 1883, known as the Precious Stones and Minerals Mining Act, 1883, so far as applicable to the said territory, and so far as they were not repealed by the said proclamations.

The provisions therein contained were wholly inconsistent with the wide and exclusive claim to mineral rights advanced by the appellants; and the question decided was whether, in the events which had happened, that claim could be enforced against the Colonial Government. Both Courts decided in effect that it could not.

Cohen, *K.C.*, and *G. Lawrence*, for the appellants, contended that on the true construction of Vilander's concessions to them they had the exclusive right to search for and win precious stones, gold, silver, platinum and other minerals, in the territory in question. Their entire claim had been granted by the judgment of the Concession Court. There was no law or regulation of British Bechuanaland which prohibited that grant. The provision that the grant was subject to certain laws and regulations was not intended to and did not limit the nature or extent of the concessions. By s. 18 of the proclamation establishing the Court, and regard being had to s. 22, that Court had no jurisdiction to extinguish the appellants' rights by limiting them in the manner contended for. Those rights were only to be limited by such laws and regulations as were not inconsistent with their continued existence. They had, therefore, the sole and exclusive right to the precious minerals. The reservation to the Colonial Government of precious stones and minerals in its subsequent grants of land in the territory is an infringement of the appellants' right.

Sir R. Finlay, K.C., and *Mackarness*, for the respondent, contended that the applicable laws and regulations were completely inconsistent with the appellants' claim. They referred to the British Bechuanaland Proclamation No. 63 of 1889. The Concessions Court only confirmed the concessions subject to laws and regulations which destroyed the present claim and reserved to the Colonial Government the sole right to dispose of the precious minerals in question. The Concessions Court had no jurisdiction to confirm and allow concessions of so wide and far-reaching a character as those contended for. They cited British Bechuanaland Proclamation No. 169 of 1893, s. 18.

Lawrence replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The question in this appeal is of the present effect, in relation to the Government of the Cape Colony, of a certain concession of minerals obtained by one Adolph Heinrich Carstensen from a native chief in Bechuanaland in 1889 and 1890. The appellants are admittedly vested in all the rights of Carstensen.

At the time of those concessions, there was only a protectorate of the territory in question, Her late Majesty's sovereignty not having been proclaimed until 1891. Accordingly it is assumed that, in those days, David Vilander, the chief who granted the concession, was competent to deal with those minerals. The immediate question is rather of the effect of the decision on the concession of a Court styled "The British Bechuanaland Concession Court," which was constituted in 1893, and authorized to inquire into and decide upon the validity and scope of all such concessions from native chiefs made prior to 1891. Postponing, in the meantime, any examination of the terms of the proclamation of February 1, 1893, establishing this Court, it is convenient now to say that the appellants submitted their claim under Carstensen's concession to this Court, and the Court inquired into and decided upon it, their judgment being entered under the head "'A' claims allowed," "A. H. Carstensen, mineral rights over the whole of Vilander's country.

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"The entire claim as proved granted, subject to all laws and regulations of British Bechuanaland relating to mines and minerals, and otherwise in force in the said territory."

The whole controversy in the present appeal turns on the qualification or condition introduced into this decision by the word "subject," and neither party has pointed to any other law or regulation as bearing on the question than a proclamation dated April 25, 1889. The contention of the respondent is that, in so far as the precious minerals are concerned, the privileges conferred by Vilander on Carstensen have, by this decision, been restricted to the rights allowed to subjects by the proclamation of 1889. It is not necessary, in detail, to compare or contrast the rights purported to be conferred on Carstensen by Vilander with the rights allowed by the proclamation. It is still less necessary to contrast the latter with the claim of exclusive right which is, for the first time, advanced in express terms in the appellants' case. Suffice it to say that the difference, in either view, is so great, that, if the proclamation be the true measure of the appellants' rights in the precious minerals, they rightly failed in the Courts of the Colony.

In the Colony the litigation between the parties was commenced by summons dated June 1, 1904, by which the appellants claimed a declaration; but it was agreed that the question should be tried on a special case, and the contention of the parties, the appellants (as plaintiffs) and the respondent (as defendant), were stated in the following (very general) terms:—

"The plaintiffs contend that the concession and further concession are and have been of full force and effect and binding upon the Government, and that they are entitled to have their rights in, arising out of, and under the said concession and further concession, declared accordingly by this Honourable Court, and to obtain an order declaring that as to all grants already issued with such reservations the Colonial Government is bound to recognize the said reservations as made for and on behalf of the plaintiffs, and directing the Government as to any further grants of land in the said territory to include a condition subjecting such grants to the rights of the plaintiffs and their successors or assignees under the aforesaid concessions."

The defendant contended: "That the plaintiffs are not entitled in the premises to the relief claimed."

The Chief Justice on March 7, 1905, granted judgment in favour of the defendant's contention, "this judgment to have effect only of absolution from the instance." On appeal, this judgment was affirmed by the Supreme Court, sitting as a Court of Appeal, on June 19, 1905. The present appeal was then brought.

Reverting now to the concession of Vilander, it is to be observed (1.) that it does not purport to make the right conferred an "exclusive right to search for and win minerals in the territory in question"; and (2.) that it is not confined to the precious minerals but applies to all minerals. It gives to the grantee a mining concession to search for and win precious stones, gold, silver, platinum and other minerals over and in one or more area or areas not to exceed in the aggregate twenty miles square or four hundred square miles, to be chosen by the grantee. Then, as soon as the grantee has selected the area, he is, in consideration of a stipulated rent and royalty, to "be entitled to convert to his own use all precious stones and all minerals whatsoever found within the limits of this concession or demise." The concession was to last so long as the stipulated rent and royalty were punctually paid.

Now it should seem the just result of these provisions that assuming the grantee, once he has selected and marked off his area, to have an exclusive right to the minerals found in that area, his antecedent right to prospect within the territory of Vilander was not exclusive and could effectively be exercised although not exclusive.

Considering, however, apart altogether from this question of exclusiveness, the effect of the qualification or condition imposed by the Concession Court in 1893 on the appellants' claim on Carstensen's concession, it is to be observed that that qualification operated solely on the right to precious minerals and did not touch the right to other minerals, which, as has been seen, was conferred on Carstensen. Accordingly it is not the case, as was maintained by the appellants, that the judgment of the Concession Court, on the theory of the respondent, extinguishes,

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while it purports only to qualify, the rights conferred by the concession. If the concessionaire had an exclusive right to prospect for the baser minerals, that right is untouched by the qualification in the judgment and he has it still. If, on the other hand, the right to prospect for the baser minerals be not exclusive, again, it exists tantum et tale as in the concession. What the qualification does modify is the right to the precious minerals. And their Lordships have not heard any argument which gives any effect at all to the words of the qualifying part of the judgment and at the same time supports the appellants' claim. Such argument as has been advanced does not offer a competing construction of the qualification (and indeed none is possible), but goes to establish a repugnancy between that part of the judgment which sustains the claim and that part which subjects it to the rules and regulations. The appellants have indeed assumed that, if there be a repugnancy, they are entitled to solve the difficulty by ignoring the condition imposed by the Court to which they submitted their claim. But it was unquestionably competent for that Court to hold the concession to have been honestly obtained, and at the same time to "modify the terms, conditions, and scope" of the concession, or to "impose equitable limitations, restrictions or conditions upon" its exercise: s. 23 of the proclamation of February 1, 1893. And it is wholly intelligible that in the present instance, the Court should allow the concession full scope as regards the baser metals, in which region the rights conferred were not in excess of existing rules, while, as to the precious metals, the concessionaires were made subject to the ordinary rules.

This is the view which their Lordships take, and they will therefore humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *Hollams, Sons, Coward & Hawksley.*
Solicitors for respondent: *Wilson, Bristows & Carpmael.*

Referred to. OIVIND LORENTZEN'S CASE. [1949] A. C. 236

[PRIVY COUNCIL.]

SS. ALBANO AND HER FREIGHT . . . . . DEFENDANTS; J. C.* 1907

AND

ALLAN LINE STEAMSHIP COMPANY, LIMITED . . . . . } PLAINTIFFS. *Jan.* 29, 30; *Feb.* 27.

UNION DAMPFSCHIFFSRHEDEREI ACTIEN-GESELLSCHAFT . . . . . } PLAINTIFFS;

AND

SS. PARISIAN AND HER FREIGHT . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian R. S. c. 79—Arts. 19, 22 and 23 of the Regulations of 1897 for Preventing Collisions—Vessels crossing so as to involve Risk of Collision—Collision off the Entrance to Harbour.

Where two vessels were approaching each other in Canadian waters on courses which converged at a point outside a harbour where each vessel expected to pick up a pilot:—

Held that, as they were so doing on courses and at speeds which would probably bring them to that point so as to present a danger of collision when they reached it, they were vessels crossing so as to involve risk of collision within the meaning of arts. 19, 22 and 23 of the Regulations of 1897, which had been substituted for those contained in Canadian R. S. c. 79; and that consequently it was the duty, negligently disregarded, of the respondents' vessel, which had the appellants' vessel on her own starboard side, to keep out of her way, there being no special circumstances within the meaning of art. 27 to authorize a departure from that rule.

Held, also, that the appellants' vessel was not to blame under art. 21. It was not shewn that with reasonable care she ought to have taken action thereunder earlier than she did.

APPEAL from a judgment of the Supreme Court (March 5, 1906), affirming a judgment of the Exchequer Court of Canada (October 3, 1905), by which it was found that the steamship *Albano* was alone to blame for a collision with the steamship *Parisian* which occurred off Halifax, Nova Scotia, on March 25, 1905.

The action and cross-action were immediately brought under

* *Present:* LORD MACNAGHTEN, LORD DAVEY, SIR ARTHUR WILSON, and SIR GORELL BARNES. *Nautical Assessors:* ADMIRAL RODNEY M. LLOYD, C.B., and CAPTAIN W. F. CABORNE, C.B., R.N.R.

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the circumstances detailed in the judgment of their Lordships. Both Courts decided against the *Albano*, but the nautical assessor, who sat with the judge of first instance, reported that in his view both vessels were to blame, the *Parisian* for a breach of art. 19 of the Regulations for Preventing Collisions at Sea, which in his opinion applied to her, and the *Albano* for approaching so close to the *Parisian* before reversing her engines, and for not passing under the *Parisian's* stern by putting her helm hard-a-starboard instead of keeping it amidships. Idington J., who dissented from the judgment of the majority of the Supreme Court, considered that the *Parisian* was alone to blame. The judgments depended upon whether in the view taken of the facts the crossing rule was applicable.

Pickford, K.C., Butler Aspinall, K.C., and *A. Pritchard*, for the appellant, contended that the *Parisian* should be held alone to blame for the collision. The vessels were crossing within the meaning of art. 19 of the Regulations for Preventing Collisions. It was the duty of the *Parisian* under that article, having the *Albano* on her starboard side, to keep out of the way of the *Albano*, and she failed, owing to her proved bad look-out, to take any measures with her helm or engines to do so. On the evidence there were no sufficient circumstances proved to render art. 19 inapplicable. It applied to the *Parisian* both before and after she stopped her engines. She was bound to keep out of the way, improperly attempted to cross ahead of the *Albano*, improperly failed to reverse her engines in due time or at all, or to take any measures to avoid collision. The *Albano* was not to blame. They cited *The Ada* and *The Sappho* (1); *The Broomfield.* (2)

Sir R. Finlay, K.C., F. Laing, K.C., and *C. Robertson Dunlop*, for the respondents, contended that on the facts as proved the vessels were not crossing with risk of collision within the meaning or application of art. 19 of the Canadian or International Regulations. At and after the time when each vessel first sighted the other each was being navigated as regards her course and speed

(1) (1872) 1 Asp. (N.S.) 475; (1873) 2 Asp. (N.S.) 4.
(2) (1905) 10 Asp. (N.S.) 194.

with reference to the pilot cutter, intending to stop before reaching the cutter, and, after taking on board a pilot from the row-boat, to proceed on the same course into Halifax Harbour. The courses pursued by the vessels would, if continued, intersect after the pilot cutter was reached. If art. 19 applied to the *Parisian*, art. 21 applied to the *Albano*. The duty was on each vessel to take such precautions against collision as were required by the ordinary practice of seamen or by the special circumstances. The breach of article 19, if any, did not contribute to the collision, for the *Albano*, notwithstanding the breach, could with reasonable care have avoided collision. They cited *The Sanspareil* (1); *The Margaret* (2); *The Monte Rosa* (3); *The Pekin* (4); *The Helvetia*. (5)

Pickford, K.C., replied.

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The judgment of their Lordships was delivered by

SIR GORELL BARNES. These appeals arise out of an action brought by the Allan Line Steamship Company (respondents), the owners of the steamship *Parisian*, against the steamship *Albano* and her freight (appellants), and a cross-action brought by the Union Dampfschiffsrhederei Actiengesellschaft, a body corporate (appellants), the owners of the steamship *Albano*, against the steamship *Parisian* and her freight (respondents). The action and cross-action were brought in respect of a collision which took place between the *Parisian* and the *Albano* off the entrance to Halifax Harbour, Nova Scotia, about 5 o'clock in the afternoon of March 25, 1905, in which both vessels were seriously damaged. The action and cross-action were tried together on April 13, 14, 17, and 24, 1905, before the Hon. James MacDonald, Ex-Chief Justice of Nova Scotia sitting as local judge in Admiralty, Exchequer Court of Canada, Nova Scotia Admiralty District, assisted by Commander Tinling as assessor, and judgment was reserved and delivered on October 3, 1905. The learned judge held that the *Albano* was alone to blame for the collision, and by decrees dated the said October 3

(1) [1900] P. 267, 287.
(2) (1884) 9 App. Cas. 873, 881, 884.
(3) [1893] P. 23.
(4) [1897] A. C. 532, 536.
(5) (1868) 3 Asp. (N.S.) p. 43, n.

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he pronounced in favour of the claim of the Allan Line Steamship Company, Limited, and condemned the ship *Albano* and her freight and the bail for the said ship *Albano* and her freight in the amount to be found due and in costs, and ordered that an account should be taken, and referred the same to the registrar (assisted by merchants) to report the amount due, and he dismissed the action of the Union Dampfschiffsrhederei Actiengesellschaft with costs, and condemned the plaintiff in that action in costs.

The appellants appealed to the Supreme Court of Canada, and the appeals were heard on February 20, 21, 22, and 23, 1906, by the Supreme Court of Canada, composed of Sedgewick, Girouard, Davies, Idington, and Maclennan JJ., sitting without nautical assessors, and judgment was delivered on March 5, 1906, Idington J. dissenting, affirming the judgments of the Court below. Both appeals were dismissed with costs.

The facts which gave rise to the action are not substantially in dispute so far as regards the main features of the case, and may be stated briefly as follows: The *Albano* is a German screw steamer belonging to the appellant company, and is of 3747 tons gross and 2423 tons net register. She was on a voyage from Hamburg to Halifax with cargo and passengers, and on March 25, 1905, having made an incorrect landfall near the entrance to the port of Halifax, was proceeding on a course of W.S.W. $\frac{3}{4}$ W. magnetic, at a speed of about nine knots an hour, approaching the Rock Head Shoal Buoy, off the entrance to the port, with the object of taking up a pilot from a pilot cutter which is stationed near to a buoy called the "Whistling Buoy." In these circumstances those on board of her observed the *Parisian* some six or seven miles distant, and about six or seven points on the port bow, making in the direction of the Whistling Buoy. The course of the *Albano* was continued until the Rock Head Shoal Buoy was about a point forward of her starboard beam, about a mile distant, and was then altered to W. $\frac{1}{4}$ S. magnetic, which would take her almost directly to the Whistling Buoy, but she was steering so as to keep the buoy a little on the starboard bow with the object aforesaid.

The *Parisian*, as the *Albano* proceeded, was observed to be

coming on a cross course at about right angles with that of the *Albano*. The *Parisian* is a steamship of 3385 tons net register belonging to the Allan Line Steamship Company, Limited, and was bound from Liverpool and Moville to Halifax, also with cargo and passengers. In approaching the entrance to Halifax Harbour, she was steering a course of about N.N.W. at a speed of about fourteen or fifteen knots an hour, making for the pilot cutter, also with the object of taking up a pilot. Those on board of her observed the *Albano* broad on the starboard bow distant about six miles at a time when the *Albano* was considerably to the eastward of the direction which it was necessary for her to take in order to enter Halifax Harbour, from which position she afterwards came on the courses above referred to towards the westward, but from that time until very shortly before the collision those on board the *Parisian* who were attending to her navigation appear to have become strangely oblivious of the presence of the *Albano*, and their attention was not directed to her again until she blew three short blasts almost immediately before the collision.

The engines of the *Parisian* at 4.57 by her time were set at half-speed, at 4.58 at "slow," and at 4.59 they were stopped, as the vessel was gradually approaching the spot at which she was to take her pilot, her course by this time having been altered to N. by W. While she was thus running off her speed the row-boat from the pilot cutter, which was then on the starboard bow of the *Parisian*, put off from the pilot cutter and rowed out towards the line of the course of the *Parisian*, and then proceeded towards the *Parisian*. At this time the *Parisian* and the *Albano* were nearing each other, and while the *Parisian* was still moving ahead through the water at a speed of about a knot an hour, and while the row-boat with the pilot on board was close to her, but before the pilot had sufficient time actually to reach her and get on board of her, the *Albano*, which up to that time had continued her course of W. ¼ S. magnetic and her speed, at 4.57 by her time put her engines down to "slow" and at 4.58 to "stop" and "full speed astern," and at the same time sounded three short blasts on the whistle. This attracted the attention of the master who was navigating the *Parisian*,

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and a little while afterwards, just before the *Albano* struck the *Parisian*, he ordered his engines "full speed ahead." At that time the *Parisian* was about crossing the bows of the *Albano*, but before the collision actually took place, owing to the engines of the *Parisian* being set "full speed ahead," she moved still further ahead, and was then struck by the *Albano* nearly at right angles between sixty and eighty feet from her stern. Both vessels were very seriously damaged, the *Parisian* being cut into and the *Albano* having her bows injured. By the time of the *Parisian* the collision took place at a few seconds after six minutes past 5; by that of the *Albano* it occurred a few seconds after 5 o'clock. The difference is accounted for by a difference between their respective clocks. After the collision the *Parisian* proceeded into Halifax and reached a place of safety before the water which entered was sufficient to sink her. The *Albano* also proceeded into Halifax.

At the trial there was a contest as to whether the *Parisian* had any way upon her or had become stationary in the water at the time when the *Albano* was approaching close to her; but the conclusion to be drawn from the evidence appears to their Lordships to be that the *Parisian*, which had been running her way off from the time when the operations with her engines first began, was still at the time when her engines were set at "full speed ahead" in motion through the water at a speed of probably about a knot an hour.

In the Supreme Court of Canada Davies J., in giving the judgment of the majority of the Court, states that he concluded from a careful analysis of all the evidence on the point that there was a slight motion of the *Parisian* through the water reaching from three-quarters of a knot to a knot, and this conclusion of the learned judge appears to relate to the time when her engines were set full speed ahead, and to be a conclusion in accordance with much of the evidence given. That she must have had way to this extent at least appears to be shewn from the evidence of Julius Kudenhold, the master of the *Albano*, who said that at the time when he reversed his engines two minutes before the collision the *Parisian* was two and a half points on his port bow, though at the time

the collision happened the *Parisian* had nearly succeeded in crossing the bows of the *Albano*.

In two respects of some importance the evidence from the *Parisian* cannot be considered by their Lordships to be accurate. The master of the *Parisian* stated that the last time he noticed the *Albano* prior to the vessels being close to each other was at 4.45, and that he did not pay attention to her and did not see her again until she was coming right down on the *Parisian*, and that the *Albano* got away behind the beam of the *Parisian*. Other witnesses from the *Parisian* speak of the *Albano* as coming up from behind the beam of the *Parisian;* but having regard to the courses upon which the two vessels were at the material time, and to the fact that they were progressing on their respective courses to the point at which they struck, and that the *Albano* struck the *Parisian* about at right angles, it seems impossible to conclude that the *Albano* approached the *Parisian* from abaft the beam of the latter. The *Albano* must have been on the starboard hand of the *Parisian* forward of her beam, and ought to have been observed approaching by those on board the *Parisian*. The other inaccuracy is that some of the witnesses for the *Parisian*, including her master, spoke of the *Albano* as coming faster ahead after the *Albano* sounded three short blasts instead of slackening her speed, as she ought to have done by reversing her engines. The evidence of the witnesses from the *Albano* was to the effect that at 4.57 by her time her engines were slowed, and at 4.58 reversed full speed astern, and continued working full speed astern for nearly two minutes until the collision took place. Very precise evidence on this point was given by the chief engineer of the *Albano*, and there seems to their Lordships no reason to doubt that the engines of the *Albano* were in fact reversed full speed astern at the time when her whistle sounded the three short blasts, and that her way had been considerably reduced at the time the collision took place, so that she came in contact with the *Parisian* at a speed probably not exceeding about three knots.

From this statement of the facts it appears that the two vessels were approaching each other on courses which converged at the point where the collision took place, that they were always in

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motion in the manner above described up to that point, that the collision took place at about right angles, and that the point at which the collision took place was about the spot at which each of these vessels expected to pick up her pilot. Had the *Parisian* picked up her pilot without accident she would have proceeded on the course on which she was up the harbour, whereas if the *Albano* had picked up her pilot it would have been necessary for her, after passing the spot where the collision took place, to have rounded up under her port helm and gone up the harbour, but she would not in the course of her navigation have altered her course until she had picked up her pilot at or about the spot where the collision took place.

The main question, then, to be considered in the case is whether the regulations in force in the waters where the collision took place ought to have been followed by these two vessels respectively in order to avoid danger of colliding. Now the collision took place in Canadian waters, and the "Act respecting the Navigation of Canadian Waters," passed in 1886 (Revised Statutes, c. 79), contained regulations for preventing collisions in Canadian waters. Sect. 5 provided that: "If, in any case of collision, it appears to the Court before which the case is tried, that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shewn to the satisfaction of the Court that the circumstances of the case rendered a departure from the said rules necessary."

Sect. 9 provided that: "Whenever foreign ships are within Canadian waters, the rules for preventing collisions prescribed by this Act, and all provisions of this Act relating to such rules, or otherwise relating to collisions, shall apply to such foreign ships; and in any case arising in any Court of justice in Canada concerning matters happening within Canadian waters, foreign ships shall, so far as regards such rules and provisions, be treated as if they were British or Canadian ships."

By s. 14 of the Act provision was made that in case of the alteration of the Imperial regulations the Governor in Council might from time to time make corresponding changes as respects

Canadian waters in the regulations contained in the Act or any that might be substituted for them, and by an Order in Council of February 9, 1897, under the provisions of the said 14th section, rules and regulations which are in conformity with the regulations approved by Order of Her late Majesty in Council on November 27, 1896, were substituted for the regulations contained in the said Act of 1886. The regulations which it is material to consider in the present case are arts. 19, 21, 22, 23, and 27 of the Canadian regulations. These articles are as follows:—

"Article 19. When two steam-vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Article 21. Where by any of these rules, one or two vessels is to keep out of the way the other shall keep her course and speed."

"Note.—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

"Article 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

"Article 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop, or reverse."

"Article 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The appellants contended that the *Parisian* and *Albano* were vessels which were crossing so as to involve risk of collision, and that it was the duty of the *Parisian*, having the *Albano* on her own starboard side, to keep out of her way. The contention on the part of the respondents was that the vessels were not vessels crossing so as to involve risk of collision, that the articles were not applicable to the case, that the *Parisian* had become practically a stationary vessel at the time when the *Albano* was approaching close to her, and that the *Albano* ought to have acted

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for the *Parisian*, and to have avoided her by taking the proper action for that purpose.

The report of the assessor, Commander Tinling, who assisted at the trial, was to the effect that in his view the *Parisian* had the duty, under art. 19, of keeping out of the way of the *Albano*, and that she had failed to perform that duty through a bad look-out and want of action taken on her part, and thereby caused the collision. He further reported that the action of the captain of the *Albano*, through an error of judgment in allowing his vessel to approach so close to the *Parisian* as to involve a collision, was much to be censured. The learned judge who tried the case held that the decision of the case did not turn upon any question of seamanship alone, but that it turned upon the construction of rules as familiar to lawyers as sailors, and he expressed himself as follows: "Entertaining a strong opinion as to the construction of these rules in the light of the evidence on which my judgment must be founded, it is my duty, with the greatest deference to Commander Tinling to assert that opinion, which I do the more readily as my opinion, if erroneous, can readily be corrected. I am of opinion that on this evidence the *Albano* should alone be held to be in fault and that there should be judgment accordingly."

Their Lordships are not able to gather from this judgment the precise views entertained by the learned judge as to the applicability of the rules in question.

In the Supreme Court of Canada the judgment of Davies J. concludes as follows: "In the case before us, however, the *Parisian* had clearly first reached the pilotage ground, had slowed down till she was practically motionless without steerage way, was, it may be said, in the very act of taking aboard the pilot who had come alongside of her from the pilot cutter in a row-boat, when the risk of collision first arose, and although so lying that the *Albano* was on her starboard side was not, in my humble judgment, from these circumstances,—all of which must be held to have been present to the eye and mind of the *Albano's* captain—a crossing ship within the rule."

Idington J., the dissenting judge, held that the vessels were crossing vessels involving risk of collision, and that art. 19

applied; that the *Parisian* ought to have taken steps to keep out of the way, which should have been taken some time before she was stopped and considered in relation to the purpose of stopping, and a proper place therefore selected. But he expressed a doubt as to whether or not the captain of the *Albano* ought not to have had more regard to art. 27, and, if blameable for not doing so, his vessel might have to share the loss, but he stated that in his judgment the *Parisian's* officers had not regarded either rule until too late, and were guilty of negligence that caused the accident.

The broad question, therefore, to consider on these appeals is whether or not the vessels were, as they approached towards the spot where the collision took place, vessels crossing so as to involve risk of collision. If they were, the *Parisian* must be held to blame under arts. 19, 22, and 23, and the only question would then be whether the *Albano* ought also to be held to blame for not having acted sooner than she did very shortly before the collision.

The case of *The Ada* and *The Sappho* (1), which was heard before Sir Robert Phillimore in 1872, and on appeal by the Privy Council in 1873, raised a question somewhat similar to that involved in the present case. In that case the two vessels were bound for Hull, the *Ada* coming from the south-east and the *Sappho* from the north-east, and both vessels were approaching the pilot cutter lying at anchor to take up their pilots, the place of the collision being at the mouth of the Humber. Sir Robert Phillimore held that the vessels were to be treated as crossing vessels under art. 14 of the Regulations for Preventing Collisions at Sea which then existed, and corresponded with art. 19 of the present regulations, and that the fact of approaching a well-known pilot station was not such a special circumstance as to take the case out of the operation of the rules, and that the *Ada* having the *Sappho* on her starboard side was bound to keep out of the way.

This judgment was affirmed on appeal, and Sir J. W. Colvile, in delivering the judgment of the Board, said: "Their Lordships think it desirable to consider whether the vessels were

(1) 1 Asp. (N.S.) 475; 2 Asp. (N.S.) 4.

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crossing vessels within the meaning of the 14th article, and consequent thereon, if the assumption which seems to have been the ratio decidendi in the Court below was correct. Their Lordships are of opinion that it was correct. It appears that both vessels, the one coming from the northward, the other from the southward, and both bound to Kingston-upon Hull, were under the necessity of proceeding to the same point where the pilot vessel was moored. It appears to their Lordships on the evidence that when first sighted the *Ada* had the other vessel on her starboard bow, and therefore, if they were crossing vessels, it was her duty to keep out of the way of the *Sappho*. Now their Lordships think that they were crossing vessels within the meaning of the rule, because both were of necessity directing their courses to one point. That point would be the point of intersection of the two courses if prolonged."

His Lordship proceeded to say that the learned judge was right, and held that the *Ada* had failed in the duty imposed upon her by the rule, and that there were no special circumstances taking her out of the operation of the rule.

There were other questions in the case as to whether the *Sappho* was to blame for not complying with the then existing art. 16, which are not material upon the simple question as to whether the crossing rule applied in the present case. It is true that in that case the *Sappho* seems to have been the vessel nearer to the pilot boat than the *Ada*, and that the senior pilot had ordered that the *Sappho* should be the first vessel to which the pilot should be sent, whereas in the present case the pilot boat was proceeding first from the pilot cutter to the *Parisian*, and the *Parisian* was first upon the spot where the collision took place, though it can only be said that the *Parisian* had reached that spot almost at the same time as, though slightly before, the *Albano*. But this difference between the two cases does not seem to their Lordships to be material upon the mere question of construction of the articles applicable to this class of case. The late Lord St. Helier, in delivering the judgment of this Board in the case of *The Pekin* (1), though dealing with a collision in a river, used language which may be

(1) [1897] A. C. 532, 536.

regarded as not inappropriate to this case. In one passage he is reported thus: "If at any time two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision, but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at the moment."

It does not appear to their Lordships possible to regard the situation in the present case from the point of view for which the respondents contend, viz., that, being on the spot first and with little motion left, they are entitled to treat their vessel as a vessel to which the rules are inapplicable, and for which the other vessel should give way. The consideration of the situation must be carried further back to the time when these vessels were approaching towards the spot where the collision took place, and would if they continued doing what each of them was respectively doing, arrive at that spot so as to involve risk of collision. It is the omission by the majority of the judges of the Court below so to consider the matter that gives rise to the principal divergence between their opinion and that entertained by their Lordships in this case, for in the passage above quoted from the judgment of Davies J. it is to be observed that he speaks of the risk of collision as first arising when the pilot boat was close to the *Parisian*, whereas, when what each vessel was doing for some time before this is taken into consideration, it seems reasonably certain that they were approaching each other on crossing courses so as to involve the very risk which resulted in an actual collision. They were in fact converging on a spot on courses and at speeds which would probably bring them to that spot so as to present a danger of collision when they reached it, which each of them would do in the course of her navigation, and their Lordships are of opinion that in these circumstances the vessels were vessels crossing so as to involve risk of collision and that arts. 19, 22, and 23 were applicable.

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It follows, therefore, that it was the duty of the *Parisian* to have kept out of the way of the *Albano*. The reason for her not doing so is clearly, as already pointed out, that those engaged in her navigation who ought to have attended to the look-out appear to have been paying no attention to the *Albano*, probably because their attention was riveted on the pilot cutter and pilot boat.

It was urged, however, by the respondents' counsel that, even if the *Albano* had been properly observed, the *Parisian* would not have been navigated differently, and they prayed in aid the provisions of art. 27; but if the duty were prima facie on the *Parisian* to keep out of the way, this article could only be of assistance to the *Parisian* if it could be shewn by the respondents that there were special circumstances which rendered a departure from art. 19 necessary in order to avoid immediate danger. No such circumstances could be shewn in this case, for if the *Albano* had been properly noticed there would have been no reason for the *Parisian* to continue on her course and place herself across the course of the *Albano* at the critical time, and no difficulty in completely taking off the way of the *Parisian* by the reversing of her engines some time before she was allowed to approach the line of the course of the *Albano*.

Again, it might be said that, if on their courses and speeds the two vessels would not have arrived at or near the place of collision at or about the same time, and if the *Parisian* had arrived at and was lying motionless at the place of collision some considerable time before the approach of the *Albano*, the circumstances might be such as to make the rule inapplicable, for then it might perhaps be said that the vessels could not be regarded as moving to a spot at the same time, and never could reasonably be regarded as crossing so as to involve risk of collision. But such a case which the respondents attempted, but failed, to make out, and upon which it is not necessary to express an opinion, is far removed from the actual facts of the present case, where the two vessels, doing what each of them did, were approaching so as to cross each other, or at any rate would probably be in motion and cross each other at or about the same time and place.

The question, however, remains for consideration whether, the *Parisian* being to blame, the *Albano* was not to blame also. She was bound to comply with art. 21, and to keep her course and speed until she found herself so close to the *Parisian* that the collision could not be avoided by the action of the latter vessel alone, and upon this view the master of the *Albano* acted, for he said in his evidence, "I had to keep my course and he had to keep out of the way. I did not think he would do it to oblige me, but I expected he would go according to the rules of the road. That is what I expected"; and further on he said he thought the *Parisian* had taken off steam to slow down for a pilot and also to let him pass.

It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this.

In the present case it is obvious that if the *Parisian*, proceeding at gradually diminishing speed as she neared the crossing line of course of the *Albano*, had reversed her engines shortly before coming to the point of intersection of the courses on which the vessels were moving, she could easily have reduced herself to a complete standstill before reaching that point, and then the *Albano* would have passed ahead of her without difficulty.

In their Lordships' opinion the master of the *Albano* might well assume, until he reached the place where he slowed and reversed her engines, that the *Parisian* would adopt this course, and there does not appear to be sufficient ground for blaming him for not taking those steps earlier. It was much pressed upon their Lordships that the master of the *Parisian* would suppose that a vessel approaching as the *Albano* was would slow down and stop her way entirely before reaching the place of the collision

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for the purpose of receiving a pilot. But, as already pointed out, she would not require to do so until at or about the time when she reached that place; although when she did so, she would probably reduce her speed, as the land to the westward was not much more than a mile ahead of her, and she would have to pick up her pilot and afterwards round up the harbour. The master of the *Parisian* could not rely upon any such supposition, and as a matter of fact from want of attention never considered the matter at all.

An argument was also addressed to their Lordships on behalf of the respondents based upon the difference between the sanction imposed by s. 5 of the Canadian Act and that imposed by the 419th section of the Merchant Shipping Act, 1894, but it is unnecessary to say more upon this point than that the argument falls to the ground as soon as it is determined that in this case the collision was occasioned by the non-observance by the *Parisian* of the crossing rules.

In conclusion, it is to be observed that the regulations are the outcome of long experience and of conferences held by representatives of the maritime nations, and, if firmly acted on and applied, are more likely to obviate the doubts and difficulties by which those navigating vessels may be assailed—for instance, in cases similar to the present case, which may not infrequently arise where vessels are making for the entrance of a port at the same time—than if the actions of those in charge are to be guided by rough estimates of courses and speeds to determine which vessel is slightly ahead of the other, and considered afterwards by the light of conflicting evidence as to whether these estimates were right or wrong.

Their Lordships will therefore humbly advise His Majesty to set aside both the judgments or decrees of the Supreme Court and of the local judge in Admiralty, there being cross-suits in the case; to declare in both suits that the *Parisian* was alone to blame for the collision; to dismiss the action against the *Albano* and her freight, with costs, in the Courts below; to pronounce in favour of the plaintiffs' claim in the cross-action against the *Parisian* and her freight; and to condemn the *Parisian* and her freight, and the bail therefor, in the amount to be found due in

the usual way by reference and in the plaintiffs' (appellants') costs in the Courts below.

The respondents must pay the costs of the appeals.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *Thomas Cooper & Co.*

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[HOUSE OF LORDS.]

BIST . . . . . APPELLANT;

AND

LONDON AND SOUTH WESTERN RAILWAY COMPANY . . . . . RESPONDENTS.

H. L. (E.)
1907
April 25.

Employer and Workman—Workman killed while disobeying well-known Rule of Employer—"Serious and wilful Misconduct"—Workmen's Compensation Act, 1897.

An engine-driver left the footplate of his engine and mounted the tender while the engine was in motion, in breach of a rule of the railway company prohibiting the act and well known to him, and was killed by collision with a bridge. In a claim by the widow for compensation the county court judge found upon the evidence that there was nothing to justify the driver in mounting the tender at the time in question, and that his act amounted, in fact, to "serious and wilful misconduct" within the Workmen's Compensation Act, 1897, and made his award in favour of the company:—

Held, that there was evidence upon which the judge might properly find as he did.

THE appellant's husband, an engine-driver in the respondents' service, was driving a train from Waterloo to Southampton. The train was late and the driver left the footplate of the engine while in motion and mounted the coal lying on the tender, where he was killed by collision with a bridge. He was well aware of the notice issued by the respondents that "enginemen and firemen must not leave the footplate of their engine when the latter is in motion." The rule was made for the protection of the men after several accidents had happened. At the trial of

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a claim for compensation in the county court at Basingstoke it was suggested that the driver's object was to try and find a better coal on the tender in order to make up time. But the train had to stop within a few minutes. The learned county court judge found as facts that the loss of time was not caused by any inferiority of the quality of the coal on the engine; that there was nothing to justify the driver in mounting the tender at the time in question; and that what the driver did amounted to "serious and wilful misconduct" within the meaning of the Workmen's Compensation Act, 1897, and awarded judgment for the respondents. This decision was affirmed by the Court of Appeal (Collins M.R., Romer and Mathew L.JJ.). Hence this appeal.

Isaacs, K.C. (*Edmond Browne* with him), for the appellant. There is no evidence of "serious and wilful misconduct" on the part of the appellant's husband. The burden of proof lies on the respondents, and has not been discharged. The facts are necessarily obscure; but it is clear that the unfortunate man did not go on the tender for any purpose of his own, but in the interest of his employers. The natural inference is that he acted on the impulse of the moment; the train was late and the supply of suitable coal short, and the whole incident was compressed within a minute. An emergency had, in the man's mind, arisen for which prompt action was needed. Misconduct no doubt there was in the act of disobedience, but it cannot be called "wilful"—a word which imports settled purpose and deliberation. The only imaginable motive was zeal for the company; there was no element of moral culpability, as no risk was involved save to the man himself. The words of the Act were considered by this House in *Johnson* v. *Marshall, Sons & Co.* (1) As the Lord Chancellor there said, "something far beyond" negligence is required; there must be "misconduct" which is "deliberate, not merely a thoughtless act on the spur of the moment." The Court of Appeal has taken a narrower view of the words than was adopted by this House. This case comes within the words of Lord James, and "the misconduct, therefore, is reduced to the

(1) [1906] A. C. 409.

bare breach of a rule, from which breach no injuries actionable or otherwise could reasonably be anticipated."

Acland, K.C. (*Simon* with him), for the respondents. The cross-examination of Bullen, the fireman, displaces the suggestion of impulse. The controversy between the two men did not arise immediately before the accident. The driver asked the fireman to get the coal from the tender, and the latter refused. This clearly proves deliberation on Bist's part. It is not necessary to impute moral fault, nor was the desire to serve his masters any exoneration. The act was deliberate—a breach of emphatic orders—and excessively dangerous, and there was the less excuse as the train was only two miles from a stopping station. In fact, Bist's conduct was as inexcusable as if a man, on the pretext of saving his master's time, should enter a powder factory in nailed boots in contravention of an order to wear list slippers.

LORD LOREBURN L.C. My Lords, everything that could be said in support of this appeal has been said, and it is not without a regret, which, I am sure, would in such circumstances be common to everyone, that I have come to the conclusion that this appeal ought to be dismissed.

I shall not say anything in regard to the construction of this Act, which has already been discussed in previous cases. The only question here is whether the facts which have been found admit of the interpretation which has been placed upon them by the learned judge of the county court when he came to the conclusion that they proved "serious and wilful misconduct." This unfortunate man broke a rule which certainly is a very serious rule. There was evidence that he knew of its existence and that he knowingly and wilfully acted in defiance of it. It was a rule to save life and to prevent danger both to the public and to the servants of the company. I cannot say that there was no evidence to warrant the conclusion of the learned judge.

It is quite true that this Act is a remedial Act, and, like all such Acts, should be construed beneficially. Negligence will not suffice. I think the duty of the Court is to insist that there shall be sufficient proof, and to scrutinize that proof, bearing always in mind that negligence will not suffice. But in this case I

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think there was sufficient evidence, and therefore we are not entitled to disturb the decision of the county court judge and of the Court of Appeal.

EARL OF HALSBURY. My Lords, I am of the same opinion. It seems to me impossible to contend that this was not what the language of the statute intends to make the test of such a thing. I can hardly imagine anything more serious than the breaking of such a rule as was broken in this case. It is a rule which is intended, as the Lord Chancellor has pointed out, for the protection both of the servants of the company themselves and of the public; and if one thinks what might be the result of a breach of such a rule both to the man who breaks it and to the public, I can hardly imagine what would be serious misconduct if this was not. Both wilful and serious misconduct is involved in doing that which would undoubtedly expose to danger both the man himself and those who in a certain sense are under his charge. Under the circumstances I could not, if I had myself been the county court judge, have done otherwise than find that it was serious misconduct, and wilful.

But, my Lords, it is impossible not also to observe that that is not strictly the question before us. We have no right to interfere with the finding of the county court judge upon a matter of fact. We can say, because then it becomes a matter of law, where there is no evidence upon which a reasonable man could find such facts as would give him jurisdiction—we can say, as a matter of law, that it was a thing that he had no right to find, because he had not the materials upon which to find it. But no one can say that that observation is applicable to this case. As I say, I myself should have found in the same way, but it is not necessary to go to that extent, because here the sole question before us, the only thing that could be argued as a question of law, is whether there was evidence to be submitted to a jury. It is manifest that there was evidence here, and we have no power to interfere with the decision.

LORD MACNAGHTEN. My Lords, I also am of opinion that the appeal must be dismissed.

LORD JAMES OF HEREFORD. My Lords, I am not disposed to differ from the opinions expressed by my noble and learned friends who have addressed the House; but I arrive at the conclusion that the judgment is correct with considerable doubt and certainly with very great regret. I may say at once, if I had occupied the position of the learned judge, or if this case had been submitted to a jury and I had been one of the jury, I should not have found the finding which the learned judge has placed on the record.

I think, of course, we ought in determining the meaning of the words "serious and wilful" to follow the judgment which was given by this House in *Johnson* v. *Marshall, Sons & Co.* (1), and I think too we clearly expound the intention the Legislature had in framing the statute if we hold that that which is "serious and wilful misconduct" must be clearly established against the plaintiff who seeks damages. Also it occurs to me that the word "wilful" must not only mean a mere intentional breach of a rule, but it also must mean wilful with the intention to be guilty of misconduct. An instance was given, I think, by my noble and learned friend Lord Halsbury of a breach of this rule by an engine-driver leaving the engine while in motion for the purpose of seeing what is the matter. Of course he is breaking the rule, and in one sense breaking the rule is misconduct; but he does not break it for the purpose of being guilty of misconduct in such a case; he breaks it for the purpose of doing what he conceives to be best for his employer. If there may be such a case of a breach of the rule where the person through whose act the cause of action arises has done an intentional act, we must, before we give effect to the words "serious and wilful misconduct," see what was in the man's mind at the time that he did so break the rule.

My Lords, in this case, when we look at the effect that is to be given to the word "serious" as controlling it, I do not think we can find it is "serious" in consequence of this unfortunate man being killed; he did not contemplate that for a moment. Therefore the case comes to this: was it wilful misconduct in the mind of the man when he left the engine to go to the tender for

(1) [1906] A. C. 409.

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the purpose of obtaining the coal; was it his intention to commit an act of misconduct? He could not, I think, have contemplated any injury to anybody else but himself by leaving the engine and taking this coal from the tender; he could not have contemplated any injury to any of the public, to any passenger or to the man who was working with him. I think he forgot the existence of the bridge, and therefore did not contemplate any injury to himself.

For these reasons I am inclined at present to think, if I had had the responsibility cast on me of giving the primary decision in the matter, I should not have concurred with the learned county court judge, but, as my noble and learned friend Lord Halsbury observed, that is not the question we have here to determine. The learned judge had to direct himself as if he had had to direct a jury, and I must confess that I think this matter was open to two views and two constructions to be put on the man's conduct. The learned judge took a view contrary to what I have suggested might have been taken, and so chose to direct himself. I do not see that it is within our province to differ from that to the extent of saying that the judgment must be set aside.

LORD ATKINSON. My Lords, on, I think, the only question of law before your Lordships' House, namely, whether there was evidence before the learned county court judge to justify him reasonably in coming to the conclusion that he did, I am of opinion that the judgment of the Court of Appeal was right. I do not attempt to define what "wilful misconduct" is, nor to express any opinion which I might be unable to retract on further consideration, but it would appear to me, I confess, that if a man breaks a rule knowing at the time that he is breaking it, and is not compelled to break it by some superior power which he cannot resist, he is guilty of a wilful breach of it.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 25, 1907.

Solicitors: *Pattinson & Brewer; W. Bishop.*

[HOUSE OF LORDS.]

NICHOLSON . . . . . APPELLANT

AND

PIPER . . . . . RESPONDENT.

H. L. (E.) 1907 *June* 18.

Employer and Workman—Weekly Payment ended by Arbitrator—Application to Review—New Circumstances—Power of Arbitrator to Review again—Res judicata—Workmen's Compensation Act, 1897.

A workman having been injured by an accident in the course of his employment, his employer agreed to make him weekly payments to continue during his incapacity for work, "or until the same shall be ended, diminished, increased or redeemed in pursuance of the Workmen's Compensation Act, 1897." Upon an application for review and termination of the payment the arbitrator made an award that the weekly payments should be ended on the ground that the incapacity had ceased. The workman did not appeal, but afterwards applied for another arbitration with respect to the review and increase of the weekly payment on the ground that he was unable to work through the accident:—

Held (affirming the decision of the Court of Appeal), that the award ending the weekly payments was upon the true construction of it final.

Quære whether the claim of the workman can be kept alive in case of the incapacity recurring by an award which suspends instead of ending the weekly payments.

THE appellant, a workman in the respondent's employ, having received an injury to his foot by an accident in January, 1904, an agreement was made on February 1 between them in writing by which the respondent agreed to pay the appellant 15*s.* per week as compensation for the injury, "such weekly payments to commence from the second week after the said accident and to continue during the incapacity for work of" the appellant, "or until the same shall be ended, diminished, increased or redeemed in pursuance of the Workmen's Compensation Act, 1897." The appellant agreed "to accept such payment in full discharge of the liability of" the respondent "to pay compensation under the provisions of" the Act. A memorandum of this agreement was duly recorded in the Greenwich County Court. Upon an application by the respondent to review and terminate the weekly payment, the learned county court judge heard evidence as to the

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then incapacity of the appellant for work, and, the evidence being conflicting, appointed a medical referee under the Act to examine the appellant and report.

The medical referee having examined and reported that the appellant was "quite able to go to work as an unskilled labourer," the judge made his award on November 17, 1905, and ordered that the agreement of February 1, 1904, "be this day terminated and that the weekly payments to" the appellant "thereunder be ended accordingly."

The appellant having on May 29, 1906, requested an arbitration under the Act "with respect to the review and increase of the weekly payment payable to" him, on the ground that he was unable to work through the accident, the learned deputy judge of the county court declined to hear evidence and refused the application, holding that the arbitration was finally determined by the award of the judge in November, 1905, and that as that award put an end to the weekly payments, there was no payment which he (the deputy judge) could review or increase.

The Court of Appeal (Collins M.R., Cozens-Hardy and Farwell L.JJ.) affirmed that decision. Hence this appeal.

Shearman, K.C., and *Edmond Browne*, for the appellant. The order of the county court judge terminating the agreement was void as being in excess of his jurisdiction. The Act itself in s. 12 of the schedule contemplates and provides for an abatement or a recurrence of incapacity by authorizing an application for a review by either party of the weekly allowance. There is no finality except death. The workman having established the liability of the employer, the right to compensation survives. In *Sharman* v. *Holliday and Greenwood* (1), where there was a second review on the application of the workman, it was held that the first review, by which the weekly sum was reduced to a nominal amount, was not res judicata. Because the payment may cease at the end of the incapacity, the liability on recurrence of the incapacity is not, therefore, brought to an end. Since the decision in *Irons* v. *Davis and Timmins* (2) a practice has grown up of reducing the compensation to a nominal sum in order to preserve

(1) [1904] 1 K. B. 235. (2) [1899] 2 Q. B. 330.

to the applicant, if necessary, the right of applying for a review. This practice was not followed in the present case—perhaps from inadvertence or ignorance of its existence—but that circumstance cannot take away the statutory rights of the appellant. Suppose an award to be obtained by perjury or miscarriage of justice, there must be jurisdiction to review.

Horridge, K.C., and *W. Shakespeare*, for the respondent. The judge acted within his jurisdiction and in accordance with the words of s. 12 of the First Schedule, that on review a weekly payment "may be ended, diminished or increased." Here it was ended, and there is no weekly payment which can be reviewed: see *Chandler* v. *Smith* (1), per Vaughan Williams L.J. The respondent's argument reads the word "ended" as meaning suspended. The award and order of November 17, 1905, amount to res judicata, and cannot be reopened. This was held in *Bradbury* v. *Bedworth Coal and Iron Co.* (2) It is enough to say that "ended" means ended, and nothing else. The appellant might, as Collins M.R. in the Court of Appeal pointed out, have appealed against the award of November 17, 1905. As he did not, he is without remedy.

Edmond Browne, in reply. It is manifestly unjust that because an error was made in November, 1905, as to the capacity of the appellant to go to work he should be for ever deprived of compensation. When the incapacity revives the right to payment should revive; otherwise justice miscarries. The learned judge cannot have meant by his award to preclude the appellant from receiving further compensation if the incapacity recurred. Such a construction is unreasonable. There is no power to appeal against a decision of fact. This is in reality an application in the nature of a new trial.

Earl of Halsbury. My Lords, speaking for myself, I am of opinion that the judgment of the Court of Appeal is right and that your Lordships ought to affirm it.

The language of the learned county court judge's judgment, I think, is not so ambiguous as has been suggested. I must follow

(1) [1899] 2 Q. B. 506, 516.
(2) (1900) 2 Minton-Senhouse, Workmen's Compensation Cases, 138.

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the ordinary natural use of the words. He has decided that the payments are to be ended. The natural meaning of those words is plain. I think it is not capable of being expressed more clearly than in the language of the judgment itself. Upon the question of keeping alive the power of going back to the county court judge in the event of new circumstances occurring rendering such a thing appropriate, I do not think it desirable to pronounce any definite opinion. It is enough for me to say that the order of the county court judge is to my mind absolutely intelligible. If I had any doubt, what the county court judge intended is very clearly shewn by the fact which has been called to your Lordships' attention by both the learned counsel, namely, that a practice has existed now for some years of making a nominal payment in order to keep the question alive. I do not say that there is any legal effect in that practice. I mention it because, when I am construing the language of the county court judge, I cannot entertain any doubt that if he had intended to prolong the period during which the application might be made he would undoubtedly have had recourse to that practice. But he does not. He uses the language of the statute that the payment is to be "ended."

It has been suggested that there would have been some difficulty in appealing against that order of the county court judge in this language because at the time the application was made, as the learned counsel for the workman agrees, there was no incapacity. But to my mind that is not a sufficient answer, because, although it may well be the incapacity had ended for the time, if there was a known practice to keep the claim alive by some form or another (whether that form is effectual, as I have said, I do not pause to discuss), and the judge made an order which precluded the possibility of any future application, it would have been quite competent to the workman or his advisers to appeal against that form of order upon the very ground that has been argued here, that there is a right to have some compensation at whatever period the incapacity may occur. The answer made by the Master of the Rolls is to my mind perfectly conclusive. If the order is, as it is to my mind, clear and intelligible, and does preclude any future applications by

reason of the recurrence of incapacity, the form of the order was a subject-matter of appeal, and the workman could have appealed. But he has not appealed. The result of that is that you have now an order which the learned judge was capable of making which, duly construed, puts an end to the right of the workman to apply again. That order was not appealed against, and therefore it is impossible for your Lordships to decide otherwise than as the Court of Appeal has decided, that this is an order properly made within the learned judge's capacity not appealed against, and therefore it must be obeyed. The form of the order as it is is such that it is hardly possible to deny—indeed, it has been very faintly denied by the learned counsel—that it does put an end to the power of the workman to apply again.

My Lords, I wish to leave entirely untouched the question whether the practice of making an order for a nominal payment is one which can have any legal effect or not. That question does not arise at present, and I do not desire to decide more than is actually before your Lordships' House at present. At all events, the result to my mind is that the order of the Court of Appeal appealed against is right and ought to be affirmed, and therefore I move your Lordships to dismiss this appeal with costs.

Lord James of Hereford. My Lords, I concur in the opinion expressed by my noble and learned friend with some hesitation, and certainly with regret. I agree with him that the county court judge intended that this order should be a final settlement. We were unable to obtain information at the bar as to whether any application was made to the judge to make a formal one shilling or one penny suspensory order. But take it either way, either that the county court judge refused to make such a usual order or that the application was not made at all, in either of those cases the county court judge must have intended that his order should be final.

My Lords, I hesitate to concur in my noble and learned friend's view as to whether there could have been an appeal from that order. I am not sure that that is quite correct. In one sense there could have been an appeal from the order, but

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if so, the appeal would be one that would be open to every applicant in such a case. Therefore I think the only argument that could be addressed to the Court of Appeal would be that every order made in such a case ought to be a suspensory order, because there were no incidents in this case to give this applicant any particular right to have that order made any more than any other suitor under similar circumstances.

That being so, I think the real question here upon which difference may arise is as to the power of review. I am not disposed to differ entirely from my noble and learned friend's view on that point; but I should like to reserve my opinion upon that point by saying that I am not entirely convinced that there is no such power to review. The instances that were put as to perjured witnesses, or an absolute mistake having occurred where the learned judge has been misled, give rise to the question whether there could be an application in the shape of what may be termed a new trial; but in this case I do not understand that there would be any other incident shewn except the revival of this illness or incapacity from causes which could not then be foreseen. Therefore it is that my doubt arises whether there ought not to be a power of review given as to incapacity in the same way as there has been a power of review given in the case of nearly all judicial decisions.

I do not think I am entitled to differ from the view that has been expressed, and I therefore with some hesitation concur in the judgment that has been delivered.

LORD ROBERTSON. My Lords, I think the judgment is right.

This application is made under the 12th section of the First Schedule of the Act. That section provides, and provides only, for revision of a weekly payment, and it postulates as the thing to be operated upon by the Court an existing weekly payment susceptible of being "ended, increased or diminished." Now here there is no such weekly payment extant, and on this short ground the application was untenable.

My Lords, I am satisfied that in the present instance the county court judge who ordered the payment to "end" intended a final termination,

I reserve my opinion as to the appropriate course to be taken under this Act by any judge who thinks that possibly there may still be a latent evil which may in the sequel produce incapacity. Accordingly, I entirely reserve my opinion as to the propriety or legality of giving a payment at some nominal rate during the period in which ex hypothesi there is no extant incapacity.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 18, 1907.

Solicitors: *Pattinson & Brewer; William Hurd & Son.*

[HOUSE OF LORDS.]

SWEENEY (PAUPER) . . . . . APPELLANT;

AND

COOTE . . . . . RESPONDENT.

Conspiracy—Wrongful Acts—Injury—Injunction.

The appellant brought an action in the Chancery Division (Ireland) against the respondent, claiming an injunction to restrain him from unlawfully and maliciously conspiring with other persons to injure the appellant in her business and employment:—

Held, that upon the facts proved there was no evidence to support the claim.

The decision of the Irish Court of Appeal, [1906] 1 I. R. 51, affirmed upon the above ground.

THE facts of this case and the evidence given at the trial before Barton J. are set forth verbatim in part and otherwise very fully in [1906] 1 I. R. 51—126. The decision of the appeal in this House turned entirely on the facts. The questions of law discussed in the Irish Court of Appeal were not determined here, and it is not necessary to reproduce in this report the arguments used and reported below.

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Vesey Knox, K.C., and *Stebbing*, for the appellant.

Campbell, K.C., and *Gaussen* (both of the Irish Bar), for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, this is one of the cases in which I desire to say as little as I can. It is a sad story, and I do not wish to aggravate any of its features by unnecessary allusions. It is an action for conspiracy, and no other ground is relied upon. In such a proceeding it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse. That, at all events, it is necessary to prove. Now, a conclusion of that kind is not to be arrived at by a light conjecture; it must be plainly established. It may, like other conclusions, be established as a matter of inference from proved facts, but the point is not whether you can draw that particular inference, but whether the facts are such that they cannot fairly admit of any other inference being drawn from them. In my opinion it has not been proved that there was a design intentionally to damage the plaintiff, although I think the intention may have been to make a protest, reasonable or unreasonable, against the course which had been taken. Nor do I see evidence of combination between the defendant and others.

I will only add two observations. The first is that I am not prepared to assent to all the propositions that are laid down in the judgments of the Irish Court of Appeal; and the second is that I hope this case will not be regarded as indicating that the opinion on a matter of fact of a judge of first instance ought to be set aside without grave reasons. The judge of first instance has opportunities which no other Court has of arriving at a conclusion with regard to the facts, and it is always necessary that there should be strong ground before he is overthrown as to the inferences at which he arrives. But in this case I think there was strong ground, and that the conclusion of the Court of Appeal was right.

EARL OF HALSBURY. My Lords, I am of the same opinion. In one sense I agree with the view which my noble and learned friend on the woolsack has suggested to your Lordships. On the

other hand, I feel some difficulty in dealing with the case, because it seems to me that there is no evidence of the facts on which reliance is placed here—that is to say, no evidence of such facts as would under any circumstances that have been suggested give a ground of action. To put the matter plainly, what is suggested is that there was a combination between the defendant and some others (I observe there is a vagueness about stating who the co-conspirators were) to bring about the dismissal of this lady. My first objection is that I think, whether it would form a ground of action or not, that is not established by the facts put in proof. If it were true that there had been such a combination, and if the object was what is suggested, to cause her to be dismissed, not upon any ground of personal objection to her, or any spite or ill will to her, but upon the ground that in the view of the parents and of the persons procuring the combination it was an undesirable thing for a Roman Catholic to be put in that position, I am of opinion that that would form no ground of action.

But the difficulty I have in dealing with it is that I think it fails in the beginning. There is no sufficient evidence of any combination. There is no evidence upon which I think any Court ought to rely, even if it were a ground of action, for saying that in this case there is any proof of a combination in the sense in which it is necessary for there to be combination in order to form the ground of an action for conspiracy. In contenting myself, as I do, with saying that I think there is no evidence, I wish to guard myself against its being supposed that I should think that there was a cause of action, even if the proposition which has been put forward by the learned counsel were established, namely, that there was a combination to do this thing. It appears to me under the circumstances it would be impossible to contend that it was not the perfect right of any parent to take that view, however unreasonable it might be; and, if he took that view, it was perfectly competent to him to consult other parents in the same place, and ask them to aid and assist him in doing what was within his right, namely, to withdraw the children from the school, although the effect might be that it would cause the dismissal of the schoolmistress.

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Therefore, while I content myself with saying that I think there is no evidence of the broad proposition which is put forward, namely, that this was done as a combined act, on the other hand it must not be supposed that if what was suggested had been proved, namely, that there was that combination, I, at all events, would be of opinion that that would form a ground of action at law.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Substantially I agree with the judgment of Lord Ashbourne and the judgments which have been delivered here. I do not think there is any evidence to support the judgment of Barton J.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I do not think that this House is required to discuss once more the delicate questions of the law of conspiracy, merely because this case is labelled as belonging to that chapter of the law, when there are no facts to justify the description. Like Lord Ashbourne, I can see no trace of conspiracy; and, indeed, Mr. Knox was faint and deprecatory in suggesting rather than asserting who were the conspirators, although this is the base of the action. Again, I see no evidence whatever of any pressure or inducement, or any interference with the choice, liberty, or will of any given person. The picture of social life presented in the evidence is not a pleasing one, nor was the respondent's part laudable; but we are in search of actionable wrong, and there is none here. The fact that religious dislike was the motive of the persons whose conduct is impugned cannot infuse into their acts a quality of illegality which does not otherwise belong to them.

LORD ATKINSON. My Lords, I concur that the decision of the Court of Appeal in Ireland was right, and that there is no evidence to sustain the cause of action declared, namely, an agreement "to prevent by undue pressure, inducement and influence, divers persons from exercising their lawful right of sending their children to" the school "according to their free

choice, liberty and will"; nor do I think there is evidence of facts to sustain the other causes of action which have been suggested in the course of the argument both here and in the Court of Appeal.

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Lord Collins. My Lords, I am of the same opinion.

Lord Atkinson.

Order of the Court of Appeal affirmed, and appeal dismissed.

Lords' Journals, April 16, 1907.

Solicitors: *Herbert Deane, for Joseph Smith, Dublin; Jordan & Lavington, for Edward V. Hamilton, Dublin and Omagh.*

[HOUSE OF LORDS.]

GORRINGE . . . . . Appellant;

AND

MAHLSTEDT and Others . . . . . Respondents.

H. L. (E.) 1907 *May* 8.

Will—Construction—Words of Futurity—Gift to Grandchildren in case any Child "shall predecease me"—Child Dead at Date of Will leaving Children.

A testator by his will gave legacies to the children of one of his sons, whom he described as "my deceased son." He gave the residue of his estate in trust for all or any of his children who should be living at his death and attain twenty-one or marry, "provided that in case any one or more of my children shall predecease me leaving any child or children living at my death, then such child or children of my deceased child shall take the share which the parent would have taken if such parent were living at my decease":—

Held, that upon the true construction of this particular will the testator's meaning was clear, and that the children of the son who was dead at the date of the will were not entitled to share in the residue.

The decision of the Court of Appeal, [1906] 2 Ch. 341, reversed, and the decision of Joyce J., [1906] 1 Ch. 319, restored.

Richard Gorringe, by his will dated July 27, 1898, bequeathed pecuniary legacies to the respondents, who were children of a

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deceased son, and whom he described as "children of my deceased son Alfred William Gorringe." After other provisions he devised and bequeathed the residue of his estate and effects to trustees "In trust for all or any of my children or child (other than and except the said Richard Pown Gorringe) who shall be living at my death and being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry under that age and if more than one in equal shares Provided that in case any one or more of my children (other than the said Richard Pown Gorringe) shall predecease me leaving any child or children living at my death then such child or children of my deceased child (other than the said Richard Pown Gorringe) shall take and if more than one in equal shares the share which his her or their parent would have taken if such parent were living and over the age of twenty-one at my decease."

The testator died in 1905 leaving eight children. The question was whether the four children of his deceased son Alfred William were entitled to share in the testator's residuary estate. Joyce J. held that they were not. The Court of Appeal (Vaughan Williams and Fletcher Moulton L.JJ., Romer L.J. dissenting) held that they were: hence this appeal on behalf of the testator's children.

In this House the case was held to turn entirely on the wording of this particular will, and not upon other wills differently worded. The arguments founded on *Loring* v. *Thomas* (1) and other cases are set out in the reports of the decisions below.

Upjohn, K.C., and *Waggett*, for the appellant.

H. Terrell, K.C., and *Fildes*, for the respondents.

EARL OF HALSBURY. My Lords, I have attempted to do in this case what I have very often done before in giving judgment upon the subject of a will. My intention is, if I can, to construe the will which is before us itself and give the natural meaning to the words and the sentences therein contained. I believe that half the difficulties have arisen by adopting some words that learned judges have used on another occasion with reference to another will as if it was a canon of construction for all wills.

(1) (1861) 1 Dr. & Sm. 497.

It is enough for me to say that I entirely concur with the judgment of Joyce J., before whom the case originally came, and with the judgment of Romer L.J. I do not think that the words are susceptible of any doubt. I wish to speak with the utmost respect of the judgment in *Loring* v. *Thomas* (1), but we have nothing to do with that judgment here. We have a will here which is perfectly intelligible in itself, and in order to do what the learned counsel for the appellants below and for the respondents here ask we must understand the testator, when he was making his will, to be referring to a contingency about his son, whom in the will itself he describes as dead. Really I do not know to what extent one is to depart from the language of a testator to give the meaning of what he intended if we are to go to that extent. I content myself with saying that I find the language perfectly intelligible and applicable to the facts which the testator must have known; and I entirely deny the sort of notion that we are entitled to speculate as to what he would have intended when I have in the plainest possible language what he has actually done. Although we see the recitals under his own hand, shewing a knowledge of the state of his family, who were dead and who were not, we are asked to assume that he was either ignorant of or had forgotten facts which it is admitted he must have known, or which, whether it is admitted or not, we have it under his own hand that he said he did know.

The proposition that I propose to adopt is this, that unless the ordinary and usual meaning of the words leads to some absurdity or something which is, to use the language of Kindersley V.-C., "manifestly contrary to the testator's obvious intention," I will simply construe the language of the will itself and give effect to the meaning of those words according to the ordinary and proper meaning of them.

It may be perfectly true to say falsa grammatica non nocet; at the same time one must not divorce language from its ordinary meaning by introducing a suggestion of false grammar —indeed, I do not think the expression falsa grammatica is applicable to what we have here. It is not that there is any fault in the grammar, but that the language is not appropriate

(1) 1 Dr. & Sm. 497.

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to that which the learned counsel desires, and therefore he wants to wrest the natural meaning of the words into something which the words do not naturally import. Unless there is something in the context of a will which prevents the ordinary and proper construction of the words in their natural meaning, I believe that every Court ought to adhere to that meaning and to give it effect.

I therefore move your Lordships that the appeal be allowed.

LORD MACNAGHTEN. My Lords, I entirely concur. I think the case is much too clear for argument. I agree with Joyce J. and Romer L.J., and I rather doubt whether the learned Lord Justice would have done more than simply express his concurrence with Joyce J., but that he was differing from the considered judgment of his learned colleagues.

But there is one observation of the learned Lord Justice that I would venture to repeat. His Lordship said: "There is absolutely nothing in that will which enables the Court to depart from the natural and first meaning of the words used." In my opinion the gift in the proviso was simply a substitutional gift, not an independent gift to all the grandchildren.

LORD JAMES OF HEREFORD. My Lords, I have listened with the greatest attention to the able argument of counsel for the respondents, but I found nothing in that argument that caused me to come to the conclusion that I must not follow the natural meaning of the words here in accordance with the judgment of Romer L.J.

LORD ATKINSON. My Lords, I concur. I think the judgments of Joyce J. and Romer L.J. were right.

Order of the Court of Appeal reversed, and order of Joyce J. restored: cause remitted to the Chancery Division.

Lords' Journals, May 8, 1907.

Solicitors: *Guscotte, Wadham & Co.; Lumley & Lumley.*

[HOUSE OF LORDS.]

POOLE AND OTHERS . . . . . APPELLANTS; AND NATIONAL BANK OF CHINA, LIMITED . RESPONDENTS.

H. L. (E.) 1907 *May* 28.

Company — Reduction of Capital — Extinguishment of Founders' Shares — Companies Acts, 1862—1877.

To give the Court jurisdiction to entertain a petition for the reduction of capital it is not essential to prove that the capital which the company proposes to cancel is lost or unrepresented by available assets.

Creditors not being concerned the questions to be considered are: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? 2. Is the reduction fair and equitable as between the different classes of shareholders?

THE respondents presented the following petition for the sanction of the Court to a reduction of capital:—

"1. The company was incorporated under the Companies Act 1862 by the registration of a memorandum with articles of association as a company limited by shares.

"2. The registered office of the company is at 61 Old Broad Street in the City of London.

"3. The objects for which the company was formed are:—

"To establish and carry on the business of commercial trading and commission agents and of bankers and financial agents in the United Kingdom of Great Britain and Ireland, China, Japan, Borneo, the Empire of India, the British Colonies and other British Dependencies in the East, America, the Philippine Islands and elsewhere as may from time to time be determined and other ancillary objects contained in the memorandum of association.

"4. The capital of the company is 1,000,000*l.* divided into 750 founders' shares of 1*l.* each and 99,925 ordinary shares of 10*l.* each. Of the said capital there have been issued the whole

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of the said 750 founders' shares which are fully paid and 40,453 of the said ordinary shares upon which the sum of 8*l.* per share has been paid. The remainder of the shares have not been taken or agreed to be taken by any person.

"5. By the articles of association it is provided that on a final distribution of assets including any reserve fund there shall be first paid to the holders of ordinary shares the amounts paid or credited as paid thereon and subject to such payment there shall be paid to the holders of founders' shares the amounts paid or credited as paid thereon, and that the net profits of the company available for dividend in each year (but subject to the power to set aside a reserve) shall be applied first in payment to the holders of ordinary shares of a non-cumulative preferential dividend at the rate of 8 per cent. on the amounts paid or credited as paid thereon, and the residue of the net profits shall be divided into two equal parts of which one shall be divided among the holders of ordinary shares and the other among the holders of founders' shares, and the directors are thereby empowered to set aside any sum out of profits to reserve.

"6. The company has power by its articles to reduce its capital.

"7. The company's principal place of business is at Hong Kong where the board meets and it also carries on business at branches or agencies at Amoy, Kobe, Shanghai, Singapore and Yokohama. It has also a branch office in London which is practically only an agency.

"8. The capital of the company in so far as called up and paid was paid either in sterling in England or in dollars taken at the then current rate of 3*s.* per dollar. The capital paid in sterling was remitted to Hong Kong and converted into dollars at the same rate.

"9. The company's funds with the exception of the Chinese Government gold bonds hereinafter mentioned are now represented by dollars. The value of the dollar has now for some years been falling and the average value of the dollar is not likely hereafter to exceed 1*s.* 8*d.* in English money.

"10. The financial position of the company at the 31st December 1903 was as follows:—

The capital paid up was . . .		£324,374
The capital reserve fund was . .	$191,973	
Reserve fund accumulated out of net profits	175,533	
Undivided profits	21,668	
	$389,174	
Or at the exchange of 1*s.* 8*d.* =		32,431
		£356,805
The assets of the bank (other than the Chinese Government gold bonds) amounted to .	$4,452,958	
Less the liabilities . .	2,213,289	
	$2,239,669	
Or at the exchange of 1*s.* 8*d.* =	£186,639	
Chinese Government gold bonds .	27,300	
		213,939
Shewing a loss of capital to the amount of		£142,866

"11. It is proposed to write off this loss of £142,866

by appropriating the:—

Undivided profits at 31st December 1903 . .	$21,668	
Capital reserve fund .	191,973	
Part of the profit reserve fund	35,443	
	$249,084	
Or at the exchange of 1*s.* 8*d.* =	£20,757	

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By writing off the whole amount paid on the founders' shares .	£750		
And 3*l.* per share of the amount paid up on each of the 40,453 issued ordinary shares . .	121,359		
		£122,109	
			£142,866
This will leave the paid-up capital represented by 40,453 shares of 7*l.* each, 5*l.* paid .			£202,265
And the reserve fund will be reduced to $140,090 . . . . . =			£11,674

"The retention of a reserve fund of at least 11,674*l.* is necessary to support the credit of the company as a bank and to meet contingencies.

"12. By a special resolution of the company duly passed and confirmed at extraordinary general meetings held respectively on the 3rd day of September 1904 and the 24th day of September 1904 it was resolved as follows:—

"'That the capital of the company be reduced from 1,000,000*l.* divided into 750 shares of 1*l.* each (founders' shares) and 99,925 shares of 10*l.* each (ordinary shares) to 699,475*l.* divided into 99,925 shares of 7*l.* each and that such reduction be effected by writing off the whole amount paid or credited as paid on each of the 750 shares of 1*l.* each and cancelling those shares and by writing off 3*l.* per share part of the sum of 8*l.* per share which has been paid or credited as paid on the 40,453 shares of 10*l.* each which have been issued and by reducing each of the 99,925 shares of 10*l.* each to a share of 7*l.*'

"13. At the time of the passing of the said resolution paid-up capital of the company to the amount of 142,866*l.* had been lost and no part thereof has since been recovered.

"At a separate meeting of the holders of the ordinary shares duly convened in accordance with article 76 of the articles of association and held on the 3rd day of September 1904 the

following resolution was passed as an extraordinary resolution as defined by section 129 of the Companies Act 1862 :—

"'That on the resolution passed at the extraordinary general meeting of the company held on the 3rd day of September 1904 for the reduction of the company's capital (involving the extinguishment of the founders' shares and the writing off of 3*l.* per share on each of the ordinary shares) being confirmed and sanctioned by the Court there be paid out of the profits of the company in priority to any dividend on the ordinary shares to every person at the date of the passing of this resolution registered as the holder of a founders' share or founders' shares the sum of 1*l.* for every such share registered in his name and that the rights belonging to the holders of ordinary shares shall be and the same are hereby altered accordingly.'

"14. The reduction proposed to be effected by the said special resolution does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid up capital.

"The form of minute proposed to be registered is as follows :—

"'The capital of the National Bank of China Limited and Reduced is henceforth 699,475*l.* divided into 99,925 shares of 7*l.* each instead of 1,000,000*l.* divided into 99,925 ordinary shares of 10*l.* each and 750 founders' shares of 1*l.* each. At the time of the registration of this minute 40,453 ordinary shares have been issued and allotted upon each of which 5*l.* has been and is to be deemed to be paid and the residue of the said ordinary shares viz. 59,472 are unissued and nothing is to be deemed to be paid up thereon.'"

The petition prayed (inter alia) : "1. That the reduction of capital sought to be effected by the above-stated special resolution may be confirmed and that the above-mentioned minute may be approved by this Court."

The petition was opposed by the holders of forty-four 1*l.* founders' shares.

Farwell J. was of opinion, upon the evidence, that the company had lost the amount of capital stated in the petition, and made an order (inter alia) that the special resolution set out in

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paragraph 12 of the petition should be confirmed in conformity with the provisions of the Companies Acts, 1867 and 1877, and approved the minute set forth in the schedule.

The Court of Appeal (Vaughan Williams, Romer and Stirling L.JJ.) affirmed that decision on the respondents undertaking that no part of the sum of $140,090 (being the balance of the profit reserve fund of the company remaining after applying $35,443 of the said reserve fund in writing off lost capital) should be applied otherwise than for capital purposes. (1)

Hence this appeal.

Feb. 28; March 4. *Eve, K.C.*, and *Jenkins, K.C.* (*Whinney* with them), for the appellants. The proposed reduction was not justified by loss of capital or the want of available assets representing capital. The Court cannot entertain a petition to reduce capital unless it is shewn that the capital to be cancelled is lost or not represented by available assets: *In re Barrow Hæmatite Steel Co.* (2); *In re Anglo-French Exploration Co.* (3) The Court will not confirm unless it is satisfied that the reduction will not work unjustly or inequitably. It was inequitable to extinguish the founders' shares altogether. There was no separate meeting of the holders of founders' shares and no special consideration of their interests. Reduction of capital implies equal treatment of all classes of shareholders, and usually involves a compromise. This is not compromise, but suppression. Such treatment of one class of shareholders is inconsistent with the principles laid down in *British and American Trustee and Finance Corporation* v. *Couper*. (4) Lord Herschell L.C. said that "any scheme which does not provide for uniform treatment of shareholders whose rights are similar would be most narrowly scrutinized by the Courts," and that the Court must "be satisfied that it will not work unjustly or inequitably." The balance-sheets ought to be examined for a series of years. The company's difficulties are only temporary. The value of the dollar has substantially risen, and the profit has been increasing and considerable addition

(1) Not reported.
(2) [1900] 2 Ch. 846, 852.
(3) [1902] 2 Ch. 845.
(4) [1894] A. C. 399, at p. 406.

made to the reserve. The last net profit was $186,000. The appellants' interest may be speculative, but they hope, not without reason, ultimately to receive a dividend; and it is not equitable that this hope should be summarily extinguished. No proper account has been taken of goodwill, the value of which is substantial. Moreover, no loss ought to be considered as sustained until the profit reserve fund has been exhausted. The loss of capital ought to be fairly borne by all classes of shareholders: see per Cotton L.J. in *Bannatyne* v. *Direct Spanish Telegraph Co.* (1)

Upjohn, K.C. (*A. R. Kirby* with him), for the respondents. It cannot be said that the appellants, in the circumstances, have any appreciable interest in the capital or profits of the bank. They would have been willing to accept a merely nominal fraction of the face value of the founders' shares. There is no prospect of additional capital, and there has been no continuity of progress. The prospect of profit on these shares is remote and inappreciable. It is no objection to a scheme of reduction that it cancels the whole of two or three classes of shares: *In re Floating Dock Co. of St. Thomas* (2), per Chitty J. Founders' shares were extinguished in *In re London and New York Investment Corporation* (3), per Stirling J. The passage referred to in *Bannatyne* v. *Direct Spanish Telegraph Co.* (1) is only dictum, and the judgment as a whole is strongly adverse to the appellants' case. The case of *British and American Trustee and Finance Co.* v. *Couper* (4) only shews that except in a strong case the Court will not interfere with the internal arrangements of a company. The *Barrow Hæmatite* decision (5) was that the particular scheme was unfair to a class of shareholders. There is here no unfairness, and the interest of the appellants, who only constitute a small fraction of holders of founders' shares, is too remote to be considered. The suggestion of a separate meeting for the holders of these shares was made in the Court of Appeal, but it appeared that such a meeting would have to be held in China, and the suggestion was

(1) (1886) 34 Ch. D. 287, 300.
(2) [1895] 1 Ch. 691.
(3) [1895] 2 Ch. 860.
(4) [1894] A. C. 399.
(5) [1900] 2 Ch. 846, 852.

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dropped. This House is now asked to overrule a discretion exercised by Farwell J. two years ago.

Eve, K.C., in reply.

The House took time for consideration.

May 28. LORD LOREBURN L.C. My Lords, in this appeal your Lordships are asked to refuse your sanction to a resolution for the reduction of its capital which has been passed by the National Bank of China. The appellants represent a very small proportion of the holders of founders' shares. But if this resolution is in fact unfair, even a few opponents will prevail. The only question is whether it is unfair; for the contention that it contravenes a bargain contained in the memorandum and articles of association cannot be made good, and it is no part of the business of a Court of justice to determine the wisdom of a course adopted by a company in the management of its own affairs.

I can see nothing that ought to induce your Lordships to interfere with the conclusion arrived at by Farwell J. and by the Court of Appeal. And I am the more inclined to agree with them by the consideration that the appellants made no specific proposal in either of the Courts below, though they maintained here that the scheme for reduction might have been so modified as to preserve their interest without thwarting the policy of the company. The conduct of an opposing minority is not without its significance in considering such questions as are now before the House. Nor is it an indifferent matter, from the same point of view, that the appellants deferred their appeal to this House to the very last day, while the resolution sanctioned by the Court was in full operation and shares presumably changing hands on the footing of its validity. Apart, however, from these latter considerations, I think this appeal should be dismissed.

LORD MACNAGHTEN. My Lords, I quite agree with my noble and learned friend on the woolsack that this appeal must be dismissed.

I venture to add a few observations, because there seems to

be a growing tendency to narrow and restrict the power conferred by the Act of 1867 on companies limited by shares. That tendency is apparent, I think, in the judgment of the Court of Appeal in the present case, and particularly in the addition which that Court has made to the order pronounced by Farwell J. The power conferred by the Act of 1867 is perfectly general. Any restriction upon it not authorized by the Act of 1867 or the Act of 1877 is calculated, I think, to lead to inconvenience and expense and to hamper and embarrass companies in the conduct of their domestic affairs.

The subject of reduction of capital was very fully considered by this House in 1894 in the case of *British and American Trustee and Finance Corporation* v. *Couper*. (1) In that case Lord Herschell, after referring to the Acts of 1867 and 1877, said: "It will be observed that neither of these statutes prescribes the manner in which the reduction of capital is to be effected, nor is there any limitation of the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured." Later on, dealing with the case before the House, he says: "The interests of creditors are not involved, and I think it was the policy of the Legislature to entrust the prescribed majority of the shareholders with the decision whether there should be a reduction of capital, and if so, how it should be carried into effect."

By way of caution he adds this observation: "There can be no doubt that any scheme which does not provide for uniform treatment of shareholders whose rights are similar would be most narrowly scrutinized by the Court, and that no such scheme ought to be confirmed unless the Court be satisfied that it will not work unjustly or inequitably. But this is quite a different thing from saying that the Court has no power to sanction it." Lord Watson takes the same view. His words are these: "Apart from the interest of creditors, the question whether each member shall have his share proportionately reduced or whether some members shall retain their shares unreduced, the shares of others being extinguished upon their receiving a just equivalent

(1) [1894] A. C. 399.

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is a purely domestic matter, and it might be greatly for the advantage of the company that the latter alternative should be adopted." Speaking for myself, I see no reason to alter or modify what I said in that case. "Creditors," I observed, "are protected by express provisions. Their consent must be procured, or their claims must be satisfied. The public, the shareholders, and every class of shareholders individually and collectively, are protected by the necessary publicity of the proceedings and by the discretion which is entrusted to the Court. Until confirmed by the Court the proposed reduction is not to take effect though all the creditors have been satisfied. When it is confirmed the memorandum is to be altered in the prescribed manner and the company, as it were, makes a new departure. With these safeguards, which certainly are not inconsiderable, the Act apparently leaves the company to determine the extent, the mode, and the incidence of the reduction, and the application or disposition of any capital moneys which the proposed reduction may set free."

Such being the views expressed in this House without any dissent or qualification, I was surprised to hear it argued by the learned counsel for the appellants that the Court has no jurisdiction to entertain a petition for the reduction of capital unless it be proved that the capital which the company proposes to cancel is lost or unrepresented by available assets. No doubt some countenance for that proposition may be found even in cases which have occurred since the decision of this House in *British and American Trustee and Finance Corporation* v. *Couper*. (1) In *In re Barrow Hæmatite Steel Co.* (2), where the scheme proposed was obviously unfair to the preference shareholders and the petition was very properly dismissed, there are some expressions in the judgment of the learned judge who decided the case which, taken apart from the context, may appear to support that contention. The decision of Buckley J. in *In re Anglo-French Exploration Co.* (3) goes even further. His language, if correctly reported, seems to imply that because the Act of 1877 specified certain cases and declared that the

(1) [1894] A. C. 399. (2) [1900] 2 Ch. 846.
(3) [1902] 2 Ch. 845.

power conferred by the Act of 1867 "includes" those specified, it is to be inferred that in all other cases the jurisdiction of the Court is excluded. If that is the meaning of what the learned judge said, with all respect I am unable to agree with his view. The condition that gives jurisdiction is not proof of loss of capital or proof that capital is unrepresented by available assets, or that capital is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect.

In the present case creditors are not concerned at all. The reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital. The only questions, therefore, to be considered are these: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? and 2. Is the reduction fair and equitable as between the different classes of shareholders?

Now the directors gave the shareholders the fullest information as to the reasons for the reduction and the causes which led them to propose it. All this is explained in the petition. It has not been suggested that the proposed reduction is open to any objection on public grounds. The question, therefore, must be this: Is it fair as between different classes of shareholders? The only objection put forward is made on the part of an insignificant number of holders of founders' shares. There are two individuals who hold five founders' shares each, and there is a public company holding thirty-four founders' shares. The directors, in their circular to the shareholders, stated that these shares were of no commercial value. That is not denied. It is proposed to pay the dissentient shareholders the par value of their shares out of profits, and to extinguish the founders' shares, because their continued existence would render it difficult, if not impossible, for the company to raise further capital. The dissentient shareholders do not demand, and never have demanded, better pecuniary terms, but they insist on retaining their holdings, which in all reasonable probability can never bring any profit to them, and may be detrimental to the

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company. I think that Farwell J. was quite right in disregarding their opposition. The learned judges of the Court of Appeal did not dissent from the view of Farwell J., but there was some expression of doubt and hesitation.

There were two other points raised before the Court of Appeal which the Court evidently thought of some importance. Although the order of Farwell J. was affirmed, the learned judges of the Court of Appeal do not seem to have been quite satisfied that the reduction proposed was in all respects proper, because they doubted whether it was exactly commensurate with the loss actually proved. Is that material in such a case as this, when the interests of the public are not concerned? So far as loss is actually proved, the case is one of those cases specially mentioned in the Act of 1877. So far as the reduction goes beyond the actual loss, it is within the general power conferred by the Act of 1867. I can see no objection to it if it is a prudent and business-like measure, not unfair to any shareholder and not detrimental to the public.

Then there was another point which the Court of Appeal took into consideration, rather unnecessarily as I venture to think. The company had established a fund out of surplus profits which they called "profit reserve fund." Part of it the company had resolved to use for the purpose of making good loss of capital. The rest, some 11,000*l.*, they proposed to retain. The petition states that the retention of a reserve fund of at least the amount proposed to be retained was necessary to support the credit of the company as a bank. I must say I should have thought that some reserve was an obvious necessity. It was, of course, quite proper for the petitioners to state all the circumstances of the case frankly and fully, but still this was a purely domestic matter, altogether outside the province of the Court. The Court of Appeal was not quite satisfied about the propriety of retaining in hand any part of the reserve fund. But the proposal was allowed to pass on the company giving an undertaking, which is embodied in the order, that no part of the sum retained out of the profit reserve fund should be applied otherwise than for capital purposes. As the company offered this undertaking, I do not propose to your Lordships that it should

be omitted, though I do not quite understand what the undertaking means or how long it is intended to last. But I must say, speaking for myself, that I do not think that this addition to the order ought to be treated as a precedent in any other case.

With these observations I concur in the motion which has been proposed. The appeal must be dismissed with costs.

LORD ROBERTSON. My Lords, I agree with the motion before the House.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 28, 1907.

Solicitors: *Slaughter & May; Blyth & Huxtable.*

[HOUSE OF LORDS.]

MERSEY DOCKS AND HARBOUR BOARD . APPELLANTS;

AND

OWNERS OF THE SS. MARPESSA . . . RESPONDENTS.

THE MARPESSA.

Admiralty— Collision—Demurrage of Dredger—Measure of Damage.

A dock and harbour board were deprived of the services of a dredger owing to a collision with a steamship in fault. The dredger cost much to maintain, earned nothing, and was maintained out of the rates. In applying the principle of *The Greta Holme*, [1897] A. C. 596, to the assessment of damages payable by the owner of the steamship:—

Held, that the loss sustained included the value of the work which would have been done by the dredger if she had not been disabled, and a sum for the cost of the daily supplies requisite for the dredger when at work, but not a sum for owners' profit, since the board had not incurred the expense of hiring a dredger.

Decisions of Sir Gorell Barnes, [1906] P. 14, and of the Court of Appeal, [1906] P. 95, affirmed.

THE questions raised by this appeal are stated in the judgment of Lord Loreburn L.C. The items in respect of which damages

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were claimed are fully set out in the report of Sir Gorell Barnes' decision below.

March 4, 5. *Sir Robert Finlay, K.C.*, and *Aspinall, K.C.* (*Leslie Scott* with them), for the appellants. The proper measure of compensation was the loss by the appellants of the daily value to them of the use of the dredger for the period of nine days. It can make no difference in the damages whether the vessel was owned or hired by the appellants. In the case of hire the test of value is the cost of hire plus working expenses, including insurance and repairs. The principles applicable were laid down in this House in *The Greta Holme* (1) and *The Mediana.* (2) Those principles have not been properly applied in the Courts below. In *The Greta Holme* (1) Lord Halsbury stated in general terms, in the case of injury to a chattel, that the damages are not merely "the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy." Lord Watson pointed out the obvious injustice which would arise if no compensation were given in respect of the deprivation of the use of articles on which large sums had been expended, and held that the damages in such a case ought to be substantial, and not merely nominal. In *The Mediana* (3) Lord Halsbury applied the doctrine to cases where the loss could not be assessed in money. The decisions both of the Court of Appeal and of the House of Lords in *The Argentino* (4) support the appellants' case, and laid down principles which were more fully worked out in *The Greta Holme.* (1) Bowen L.J. said the rules of the common law were applicable to such a case. (5) On appeal to this House Lord Herschell said (6): "The loss of the use of a vessel . . . . is certainly damage which directly and naturally flows from a collision." In *The Greta Holme* (1) these principles were applied by Lord Halsbury, Lord Watson, and Lord Herschell to a vessel the owners of which were precluded from making a profit. The damages ought to include the fair hire of a vessel of this kind, if

(1) [1897] A. C. 596.
(2) [1900] A. C. 113.
(3) [1900] A. C. 113, 117.
(4) (1889) 14 App. Cas. 519.
(5) (1888) 13 P. D. 191, 200.
(6) 14 App. Cas. 519, 523.

the appellants were compelled to hire one, and of this no account has been taken.

Pickford, K.C., and *Greer*, for the respondents. There is no evidence of any actual loss to the appellants, and this claim is purely conjectural and speculative. It is true that during the detention of the dredger no sand was dredged; but it could be dredged later, and there is no reason to suppose that loss was sustained by the brief delay. The sum allowed by the registrar and merchants was based upon the evidence adduced, and the allowance of 35*l.* a day was reasonable and ample. The appellants declined to go into the items, and *The Greta Holme* (1) was not cited. But the decisions below are not inconsistent with *The Greta Holme* (1) and *The Mediana*. (2) No doubt the compensation is the loss of the use of the vessel. But it is the vessel as she was at the time—her depreciated value. She was built for 56,000*l.*, but she was only worth at the time about 33,000*l.* But on any view the sum awarded is ample. In one year the claim would, at 102*l.* a day, have made up the value of the ship as she was. There is nothing in the decisions of this House in *The Greta Holme* (1) and *The Mediana* (2) in favour of estimating damages on the basis of original cost. In the former the damages claimed were 1500*l.* (3), but in this House that sum was reduced to 500*l.* This House did not supply a measure of damages, but only laid down a general principle. If in any respect the award differs from those made in the cases in this House, it errs on the side of liberality.

Sir R. Finlay, K.C., in reply.

The House took time for consideration.

May 29. LORD LOREBURN L.C. My Lords, the only question arising on this appeal is whether the damages awarded to the appellants are rightly measured. It was a case of collision in which the steamship *Marpessa* ran down the sand pump dredger *G. B. Crow* and disabled her for nine days. This dredger is used by the Mersey Docks and Harbour Board in the necessary

(1) [1897] A. C. 596. (2) [1900] A. C. 113.
(3) [1896] P. 192.

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Lord Loreburn L.C.

work of dredging the bar outside Liverpool. She earns nothing in money and costs a good deal, but she does indispensable service in clearing away the sand.

Negligence on the part of the steamship *Marpessa* being admitted, the case came before the registrar to ascertain damages. No dispute was raised by defendants as to any of the items claimed except one, viz., the claim for demurrage for nine days at 104*l.* per day, afterwards reduced to 102*l.* The registrar found that 35*l.* per day sufficed, and his report was confirmed by the President, and also by the Court of Appeal. I need hardly say that your Lordships are not likely to interfere unless it is made clear that a wrong principle was adopted for the ascertainment of these damages.

Now until the case of *The Greta Holme* (1) the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such a case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases.

It seems to me that the loss sustained in the present case under the claim of demurrage is the value of the work which would have been done by the dredger during those days had she not been disabled. So many tons of sand would have been removed, which it is the duty and the interest of the plaintiffs to remove, and which by reason of the defendants' negligence were not removed. If the plaintiffs had hired another vessel to do this work they could have recovered the cost of doing it. They have not done so, no other vessel being available at so short a notice, and, perhaps, not being available at all; for the construction is peculiar. Failing that evidence, the plaintiffs were entitled to put their case in another way. They might say: The cost to us of maintaining and working this dredger, while it is working, amounts to so much

(1) [1897] A. C. 596.

per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.

In fact, the plaintiffs put in a mixed claim, made up mainly on the basis of what the dredger's services cost them; but they added an item for owner's profit, which was appropriate enough if they had paid it to the owner of a vessel which they hired, but had no place in a claim based on the cost to themselves of the services rendered by the dredger. The registrar allowed them something on this head to which they were not entitled. He also deprived them of something to which they were entitled when he gave only the daily supplies requisite in dock instead of the daily supplies requisite when the dredger was working. There is a confusion in the registrar's award in these respects, and also in regard to general damage in the circumstances of this particular case, but the original confusion was in the claim as stated by the plaintiffs. I certainly am not disposed to disturb the findings of three tribunals on such a point, when the difference between what was found and what in rigorous logic ought to have been found is trifling. And so with the complaint that the percentage allowed for depreciation was taken, not on the original, but on the reduced value of the dredger. I cannot say that in point of law the depreciation must be taken on the original value, nor am I prepared to exact mathematical precision in matters such as this. In my opinion, though there is error in the registrar's report, there is no case for the interposition of this House. We cannot correct every minute mistake. And if we think, as I think, that after correcting the errors on both sides the registrar might well arrive at substantially the same figure as he has already found, we ought to dismiss the appeal.

LORD ASHBOURNE. My Lords, I entirely agree with the Lord Chancellor.

LORD MACNAGHTEN. My Lords, I agree.

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LORD ROBERTSON. My Lords, I concur in the judgment proposed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 29, 1907.

Solicitors: *Rawle, Johnstone & Co., for W. C. Thorne, Liverpool; Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

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June 3.

MAYOR, &c., OF COUNTY BOROUGH OF WEST HARTLEPOOL . . . . . } APPELLANTS;

AND

COUNCIL OF ADMINISTRATIVE COUNTY OF DURHAM . . . . . } RESPONDENTS.

Local Government—Creation of County Borough—Loss of Borough's Contribution to County Expenses—Adjustment of Financial Relations—Compensation to County—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 32, 62.

When a new county borough is created by separation of the borough from the county the financial adjustment between the borough and the county must not include compensation from either to the other for the loss of a contributing area.

Upon the true construction of the Local Government Act, 1888, the meaning of s. 32 is not that the entire financial position of the county and the county borough is to remain the same relatively to each other, but that it is to be so as regards the distribution of the Exchequer contributions; and that in adjusting the financial relations between the two bodies an equitable provision shall be made for imposing upon each its fair share of the burden, which was a joint burden and is no longer to be joint.

Decisions of Channell J., [1905] 2 K. B. 340, and of the Court of Appeal, [1906] 2 K. B. 186, reversed.

The reasoning of *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A. C. 171, adopted and applied.

BY a Provisional Order and Confirmation Act the borough of West Hartlepool was separated from the county of Durham and

constituted a county borough. The arbitrator appointed by the Local Government Board to make the equitable adjustment under the Local Government Act, 1888, s. 32, stated a case raising two questions—viz., 1. whether the county borough must pay the county council certain sums in respect of the repair, maintenance, and improvement of county bridges and main roads, and in respect of other county expenses; 2. whether the county council must pay the county borough certain sums in respect of children in district school reformatories, of subsidized roads, and of fines. Channell J. answered these questions in the affirmative, and this decision was affirmed by the Court of Appeal (Vaughan Williams, Stirling and Fletcher Moulton L.JJ.). Hence this appeal.

The details of the claims on both sides are fully set out in the reports of the decisions below.

April 22. *Cripps, K.C.*, and *Macmorran, K.C.* (*Fleetwood Pritchard* with them), for the appellants. The question is one of the balance of rating between the newly constituted borough of West Hartlepool and the county council. The adjustment is to be so effected that neither the borough nor the county council shall "be placed in any worse financial position" by reason of the creation of the borough. This guiding rule has been ignored by the Courts below. Compensation and adjustment are not the same thing, and the question here is purely of adjustment. The leading principle is laid down in *Caterham Urban Council* v. *Godstone Rural Council* (1), where Lord Halsbury dwells upon the distinction. Lord Davey said (2): "When one speaks of the severance of an administrative unit, it is only a compendious way of expressing this result. That the rates derived from the severed district will be lost to the district from which it is severed is the inevitable consequence and intention of putting the Act in force; and if this were intended by the Legislature to be a matter for compensation, some words should be found in the Act which confer the right to such compensation. Adjustment seems to me a different idea from compensation." That case was, it is true, under s. 62 of the Act, whereas the

(1) [1904] A. C. 171. (2) [1904] A. C. at p. 175.

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present is under s. 32. But the latter is the more comprehensive, and they are both adjustment sections. Moreover, in s. 32, sub-s. 3, the adjustment is to be of the "existing property, debts, and liabilities." The word "existing" is not found in s. 62. The respondents' claim is really for compensation, not adjustment. There was no "financial relation" in respect of the items of claim, and no existing liability on the part of the appellants to contribute to the expenses referred to in the respondents' claim.

Shearman, K.C. (*Simey* with him), for the respondents. The jurisdiction of the arbitrator is conferred by s. 32, sub-s. 1, where it is provided that the adjustment is to be "of any expenses which may in future be incurred." The word "existing" is really equivalent to "continuing." "Adjustment" may well be made by a money payment in respect of the cessation of certain payments, as, for example, in the case of main roads, for which the "existing" liability of the borough area is to cease. No doubt "adjustment" and "compensation" are not the same; but the former has no definite meaning, as pointed out by Wills J. in *In re Buckinghamshire County Council* v. *Hertfordshire County Council* (1), and, as was done in that case, the adjustment may well be effected in the form of a money payment, and all the more so as the result is to be that neither party to the arbitration shall be in a worse financial position than before. Moreover, the adjustment is to be "equitable." The Caterham case was under s. 62, which is wholly different from s. 32. Lord Davey (2) describes s. 62 as "nothing more than a procedure section," whereas s. 32 is described as "adjustment of financial relations between counties and county boroughs." At all events, if the first question submitted—whether the loss sustained by the county council is the subject of a valid claim—is to be answered in the negative, the second question—whether the loss of the borough council can be so considered—must also be so answered.

Cripps, K.C., in reply.

The House took time for consideration.

(1) [1899] 1 Q. B. 515. (2) [1904] A. C. at p. 176.

June 3. LORD LOREBURN L.C. My Lords, this appeal raises the question whether, on the creation of a new county borough, the financial adjustment between such borough and the county from which it is separated ought to include compensation from either to the other for loss of a contributing area. If that be the law, then both the county of Durham and the borough of West Hartlepool can shew that they will hereafter have to bear alone certain expenses which until their separation they bore in common, and each will be then entitled to compensation from the other for the loss so caused by such separation. The question depends upon the true construction of the Local Government Act, 1888, ss. 32 and 62.

Your Lordships decided in the Caterham case that where there has been a separation of an urban district from the rural district of which it formed part, the consequent adjustment ought not to include any compensation of the kind suggested. I have been unable to find any reason why the law should be different when a county borough and a county are concerned. But the case of the urban district rests on s. 62 of the Act, while the case of the county borough rests on ss. 32 and 62 together, principally on the former. So we must see what these sections say; for, if the introduction of s. 32 creates a difference, it does not signify whether or not we can perceive an adequate reason for making a difference.

I do not think that in this respect there is a difference. Sect. 32, sub-s. 1, requires that "save as provided in this Act any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment." And sub-s. 3 of the same section requires that in such adjustment regard shall be had to "the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate grant as provided by this Act." This language does at first sight look as if it

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was intended to effect a financial separation between counties and county boroughs, but as a condition of such separation to require that each shall in future pay the same proportion of what theretofore had been the joint outlay, and receive the same proportion of what had been theretofore the joint income. No doubt the wording of this section is very loose, but if that is what it means, much unnecessary circumlocution is used to say what might be said very plainly in very few words. In my opinion that is not the meaning. The "equitable adjustment" of which the section speaks is described in s. 32, sub-s. 1, as "an equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough." It seems to me that this distribution of the Exchequer contribution is the thing pointed at in the words I have quoted from sub-s. 3 of s. 32. Those words do not mean that the entire financial position of the county and the county borough is to remain the same relatively to each other, but that it is to be so as regards the distribution of the Exchequer contributions. And when it is said in sub-s. 1 that there is to be an "equitable provision for such cessation," it does not mean that there is to be compensation to the county from the county borough, and from the county borough to the county, for the cessation of any existing liability to contribute or to incur expense. The word "compensation," used elsewhere in the Act, is avoided here. The meaning is that in adjusting the financial relations between these two bodies an equitable provision shall be made for imposing upon each its fair share of the burden, which was a joint burden, and is now no longer to be joint.

I feel that in so reading these sections I am putting a gloss upon the language used. But the language is so peculiar that without putting some gloss upon it no coherent interpretation can be found. And I consider that, though the actual decision of your Lordships in the Caterham case does not necessarily govern this, yet that the reasoning of the learned Lords who took part in that judgment constrains me to a like conclusion. I say so, not because I in the least doubt that reasoning, but

because it supports me in differing from the opinion of the Court of Appeal and Channell J. on the construction of sections which admittedly are obscure and difficult.

I respectfully advise your Lordships to reverse the order appealed from, and to answer both of the questions submitted by the arbitrators in the negative as regards all the items to which they refer.

My Lords, I may say that my noble and learned friend Lord Collins desires me to state that, in his opinion, after careful consideration, the judgment in the Caterham case decides this case.

Lord Ashbourne. My Lords, I entirely concur in the judgment moved by the Lord Chancellor, and have nothing to add.

Lord Macnaghten. My Lords, I also agree.

Lord James of Hereford. My Lords, I agree in thinking that the Caterham case controls this case.

Lord Robertson. My Lords, I concur in the judgment proposed.

Lord Atkinson. My Lords, the two questions for decision in this appeal are—1. whether, when a borough is created a county borough under the provisions of the Local Government Act of 1888, and becomes a separate administrative area, thereby ceasing to be rateable by the adjoining county for the maintenance of main roads and other services therein, the borough is liable to compensate the county for the loss thus sustained by the latter; and, if so, 2. whether the county is not equally liable to pay compensation to the borough in respect of the loss sustained by it by reason of the county's ceasing to contribute anything to the cost of its administering.

The questions turn on the construction of s. 32, sub-s. 1, of the statute, dealing with the adjustment of the financial relations between the two self-governing areas.

In the case of *Caterham Urban Council* v. *Godstone Rural Council* (1), it was decided by your Lordships' House that when

(1) [1904] A. C. 171.

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a parish is, under s. 57 of the same statute, separated from a rural district and made a new urban district, thereby ceasing to be rateable for the highway expenses of the rural district, it is not liable, on the adjustment of the financial relations between the two under s. 62, to pay compensation for the loss thus sustained by the rural district.

Prima facie one would suppose that the financial relations between a county borough, created as West Hartlepool was, and the county of which it previously had formed a part, should be adjusted on principles the same as those upon which the financial relations between a newly-created urban district and the rural district of which it previously formed a part are adjusted. It is contended, however, that this is not so; that the difference in the wording of the two sub-sections, namely, s. 32, sub-s. 1, and s. 62, sub-s. 1, necessitates that they should be differently construed, and requires that different principles of adjustment should be applied in the two cases, and different results arrived at; and that the Caterham case has no application at all to this case. The clause in the first-mentioned sub-section upon which reliance is placed to justify this result runs as follows: "And save as provided by this Act, any existing liability to contribute or to incur expense shall cease and an equitable provision for such cessation shall be made in the adjustment."

The amount raised by the assessment of the parishes within the borough of the county rate is, by sub-s. 9 of s. 32, to be included in the expression "contribution," and it is insisted that the mode in which an arbitrator is entitled to make "equitable provision" for the cessation mentioned is to award to the county council, either in the shape of an annual payment or of a lump sum, compensation for the loss of this contribution to any amount or on any principle he may think fair and just. The practical result of such an arrangement would be that in effect the borough would continue to contribute to the county rate after the services in respect of which the contribution was supposed to be made had ceased. The whole scheme of the statute, however, is that when administrative urban areas, whether county boroughs or not, are created they shall have

power to tax themselves to the extent necessary to carry out the duties imposed upon them, and shall not be called upon to contribute to the cost of the services rendered outside their respective areas by which they are not directly benefited. The only express provision I can find in the Act for the payment by an urban area of any sum in respect of services which have ceased to be performed for its benefit is that contained in sub-s. 3 (*b*) of s. 32. According to this provision a county borough, which was not a quarter sessions borough at the passing of the Act, might, on becoming a quarter sessions borough, redeem the contribution it was obliged to make before the change to the cost "of and incidental to the quarter sessions and petty sessions of the county and of and incidental to the coroners of the county or any franchise therein."

It is stated in the special case that there are no main roads or bridges in Hartlepool. As far as the assessment of these works is concerned, the borough has been paying its money for nothing. The contribution to the county council was pure profit. They rendered no direct or immediate service to the borough for it. The loss caused to the county is all the greater on account of this, but the burden to the borough is all the more unfair. On what equitable principle, therefore, is the compensation to be fixed? Is it to be fixed according to the money value of the loss, or the moral quality of the burden? If the former, the higher the amount of the contribution the larger the compensation. If the latter, the higher the amount of contribution the more oppressive and unfair the burden, and the less the justification for its continuance for any time, or in any shape. Or is the compensation to be treated as a penalty to be imposed upon the borough because of its successful attempt to escape from the financial control of the county, and to be regulated in amount according as the borough's desire for autonomy is deemed excusable or the contrary?

It was apparently to meet considerations of this nature that Mr. Shearman insisted that the arbitrator might proceed on any principle he thought equitable, and award any amount he thought fair; but whatever be the guides the arbitrator may follow, the operation he is to perform must be performed in the "adjustment."

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I think that word is inapplicable to the ascertainment of compensation based on no known principle and measured by no known rule. The words of the statute are "equitable provision for such cessation." There is nothing about loss or compensation. The words may have a different subject-matter to apply to, such as the arrangements to be made when the borough becomes a county borough in the interval between the times of striking two rates, or matters of that sort. I think the word "adjustment," as used in this section, means the division, or arrangement, or distribution, or apportionment of existing liabilities, not losses of the kind suggested.

I am, therefore, of opinion that this case is governed by the Caterham case, and that the appeal should be allowed with costs.

LORD LOREBURN L.C. My Lords, under the circumstances I think the costs might be dealt with by ordering the respondents to pay the appellants' costs here and in the Court of Appeal.

Order of the Court of Appeal reversed; and the questions submitted by the arbitrator to be answered in the negative as regards all the items to which they refer: the respondents to pay to the appellants their costs here and in the Court of Appeal: cause remitted to the King's Bench Division.

Lords' Journals, June 3, 1907.

Solicitors: *Baker & Co., for Higson Simpson, West Hartlepool; Maude & Tunnicliffe, for R. Simey, Durham.*

[HOUSE OF LORDS.]

GUARDIANS OF THE POOR OF FULHAM PARISH . . . . . } Appellants;

AND

GUARDIANS OF THE POOR OF WOOLWICH UNION . . . . . } Respondents.

H. L. (E.) 1907 *June* 4.

Poor Law — Settlement and Removal — Illegitimate Child — Settlement by Residence—Irremovability—Residence of Child under Sixteen with reputed Parent—Acquisition of Settlement under Sixteen—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35—*Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *ss.* 1, 3—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111).

An illegitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its reputed father who is irremovable therefrom.

Decision of the Court of Appeal, [1906] 2 K. B. 240, affirmed upon the above ground.

Rosa Turpin, the wife of William Turpin, left her husband and lived with John Johnson, by whom she had (among others) five children. All these children were born in the parish of Lambeth, and lived there with their mother and John Johnson, whose residence in that parish continued without a break and without relief from the guardians for more than three years. During the same period William Turpin resided for more than three years in the parish of Charlton-next-Woolwich, in the Woolwich Union, in such manner and under such circumstances as made him irremovable therefrom and settled therein. In 1903 the children (who were all under sixteen) became chargeable to the parish of Fulham, having resided there not quite a year. An order having been made for their removal to the Woolwich Union, the question was whether the children were settled in the parish of Charlton-next-Woolwich, in the Woolwich Union. The King's Bench Division (Lord Alverstone C.J., Kennedy and Ridley JJ.) held that they were so settled. (1) That decision was reversed by the Court of Appeal (Vaughan Williams, Stirling and Fletcher

(1) [1905] 2 K. B. 203.

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Moulton L.JJ.), who held that the children were settled in the parish of Lambeth by reason of their residence with their mother in that parish. (1) Hence this appeal.

April 22, 23. *Macmorran, K.C.*, and *Sydney Davey*, for the appellants. Being illegitimate, these children could not acquire a settlement of their own under the age of sixteen, and therefore could only take their mother's settlement; and the question is, What was that settlement? The answer depends on the meaning of s. 1 of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), and ss. 34 and 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61). By the former the status of irremovability is established at the end of five years, a period subsequently reduced to three years and then to one year. By s. 34 of the Act of 1876, after three years' residence a person who has become irremovable in a parish is to be deemed to be settled therein until he shall acquire a settlement elsewhere, and by s. 35, in which for the first time a child, as distinguished from a "person," is dealt with, "an illegitimate child shall retain the settlement of its mother until such child acquires another settlement." It is true that s. 35 excludes inquiry into the derivative settlement of the parent, and when such inquiry would otherwise be necessary the settlement is to be the place of the child's birth. But Lord Watson in *Reigate Union* v. *Croydon Union* (2) held that this exclusion does not apply to children under sixteen: see observations of Lord Esher M.R. in *West Derby Union* v. *Atcham Union*. (3) *Manchester Union* v. *Ormskirk Union* (4) was precisely the same as this, and it was held that the child followed the mother's settlement, which here was that of her husband. For the principle of aggregation of residence before and after sixteen for the purpose of acquiring a settlement, see *West Ham Union* v. *Holbeach Union* (5) and *Highworth and Swindon Union* v. *Westbury-on-Severn Union*. (6)

The Court of Appeal have held that the proviso to s. 1 of the

(1) [1906] 2 K. B. 240.
(2) (1889) 14 App. Cas. 465, at p. 484
(3) (1889) 24 Q. B. D. 117, 120.
(4) (1890) 24 Q. B. D. 678.
(5) [1905] A. C. 450.
(6) (1889) 14 App. Cas. 465.

Poor Removal Act, 1846, "That whenever any person shall have a wife or children having no other settlement than his or her own, such wife or children shall be removable whenever he or she is removable and shall not be removable when he or she is not removable," does not apply to illegitimate children. But if the parent is irremovable, the child is irremovable, even over the age of sixteen: Lord Herschell L.C. in *West Ham Union* v. *Bethnal Green Churchwardens.* (1) There is, however, no reason for confining the proviso to legitimate children; it is not so confined in many statutes, as, for example, in the Vaccination and Education Acts. The purpose was to prevent the separation of families, and s. 3 of the Act of 1846 applies both to legitimate children and to bastards. It is clear also that a child under sixteen can only acquire a derivative settlement.

A point taken by the respondents in this House, but not in the Courts below, is that, if it cannot be shewn what settlement the children acquired without inquiry into their mother's derivative settlement, their settlement is the parish in which they were born. That contention, however, is inconsistent with Lord Watson's words in *Reigate Union* v. *Croydon Union* (2) that the proviso does not extend to children under sixteen. There was no evidence that the mother was a deserted woman, so as to acquire irremovability apart from her husband under 24 & 25 Vict. c. 55, s. 3: see *Reg.* v. *Cookham Union.* (3) Legitimate children cannot get a settlement of their own under the age of sixteen, and it would be strange if bastards could do so. In *Reigate Union* v. *Croydon Union* (2) both Lord Watson and Lord Macnaghten said that the object of s. 35 of the Act of 1876 was to place both classes of children on the same footing. The children, therefore, take the settlement of their mother, who is the only person recognized by the poor law in the case of an illegitimate child. The mother, not being a deserted woman within 24 & 25 Vict. c. 55, s. 3, retained the settlement of her husband, which was in the respondents' union.

Rawlinson, K.C., and *Cox-Sinclair* (*Lampard* with them), for the respondents. The children acquired an independent, and

(1) [1894] A. C. 230, 235. (2) 14 App. Cas. 465, at p. 484.
(3) (1882) 9 Q. B. D. 522.

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not derivative, settlement in the appellant union. Under the poor law as it lasted till 1876 an illegitimate child under sixteen could acquire a settlement of its own, as, e.g., by apprenticeship. These children acquired their settlement by s. 3 of the Poor Removal Act, 1846, by which illegitimate children living with their reputed father cannot be removed when the father cannot lawfully be removed. The father was irremovable, so, therefore, are the children. This is not altered by s. 34 of the Act of 1876.

The whole difficulty has arisen from Lord Watson's words in *Reigate Union* v. *Croydon Union* (1), which the Court of Appeal thought to have been misunderstood. There is no reason for holding that the exclusion of derivative settlements does not apply to persons under sixteen. Lord Watson's dictum—it was not necessary to the decision in that case—was not expressly accepted by the other Lords. But it has never been decided that children under sixteen cannot acquire a settlement of their own. The contrary was stated in *West Ham Union* v. *Holbeach Union* in the Divisional Court (2); *Reg.* v. *Elvet* (3), approved in this House in *West Ham Union* v. *Holbeach Union.* (4) That an illegitimate child could do so was held in *Bodenham Overseers* v. *St. Andrew's (Worcester) Overseers.* (5) The proviso of s. 1 of the Act of 1846 is confined to children born in wedlock, as the words are "wife and children." This is clear, as s. 3 deals explicitly both with legitimate and illegitimate children. Sects. 34 and 35 of the Act of 1876 are wholly distinct from each other: the former creates, the latter abolishes. The 1st paragraph of s. 35, with the exceptions mentioned, abolishes derivative settlements; the 2nd confers on an illegitimate child its mother's settlement until it acquires another settlement; and the 3rd, in the circumstances mentioned, applies the birth settlement. Here the children have acquired another settlement. But if it cannot be shewn what settlement the children acquired without inquiring into the mother's derivative settlement, these children must be settled in the place of their birth.

(1) 14 App. Cas. 465, at p. 484.
(2) [1903] 2 K. B. 627, 632.
(3) (1859) 2 E. & E. 266.
(4) [1905] A. C. 450.
(5) (1853) 1 E. & B. 465.

Macmorran, K.C., in reply. The meaning of the word "child" depends upon the context, and in the proviso to the Act of 1846 may well be taken to include a bastard. There was no desire to penalize the illegitimate; rather it was the Legislature's aim to assimilate both classes to each other—to keep families together.

The House took time for consideration.

June 4. LORD LOREBURN L.C. My Lords, the question here is whether illegitimate children under sixteen years of age are to be regarded as settled in Woolwich Union or in Lambeth Union.

They are the children of Rosa Turpin, a married woman, who left her husband, by John Johnson. All of them were born in the parish of Lambeth, and they resided there with their parents for three years without break and without relief from the guardians. During those three years Turpin, the husband of Rosa Turpin, resided in the Woolwich Union, so as to become irremovable therefrom and settled therein. In 1903 the children became chargeable to the parish of Fulham, having resided there not quite a year. Fulham thereupon claims that the children were settled in Woolwich Union. Woolwich denies that, and alleges that their settlement was in Lambeth. So the question really is whether or not the settlement was in Lambeth. The Court of Appeal decided that it was in Lambeth. Hence this appeal.

Two points were made by counsel for the appellants. In the first place, he maintained that illegitimate children cannot acquire a settlement under the age of sixteen, and that, therefore, those children had not acquired a settlement in Lambeth.

Now it is to my mind clear that up to the time when the Act of 1876 (39 & 40 Vict. c. 61) was passed such children could acquire a settlement in certain circumstances. It is also clear that under the Act of 1846 (9 & 10 Vict. c. 66), if they resided in any union for a sufficient time, they could acquire a status of irremovability as distinguished from a settlement. And to my mind s. 34 of the Act of 1876 was intended to say, and did say, that all persons, of whatever age and whether legitimate or not,

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who had a status of irremovability should be also endowed with a settlement.

This is not really questioned, except as to illegitimate children. But it is argued that the effect of s. 35 of the same Act was to qualify s. 34 and to make it inapplicable in the case of illegitimate children under sixteen. I cannot think so. The two sections deal with different subjects, and are entirely consistent the one with the other. My difficulty on this part of the case has not been how to decide, but how to appreciate the argument. I am sure it ought not to succeed.

The other point made on behalf of the appellants is more formidable. It was urged that in the present case these children did not, in fact, acquire a settlement under s. 34 of the Act of 1876, because they had not acquired a status of irremovability. The Act of 1846 was invoked, together with the amending Act of 1848 (11 & 12 Vict. c. 31). It was argued that the mother of these children was always removable from Lambeth parish, because, having a husband, she was incapable of acquiring any settlement or status of irremovability, and therefore the children could be removed also.

In my opinion the purpose of s. 3 of the Act of 1846 was to prohibit the breaking up of homes, and its effect in this case was to bestow on these children a status of irremovability and accordingly a settlement. Their father, or reputed father, was irremovable from Lambeth, and it will suffice for this section that either he or the mother was irremovable. There is, to my mind, no ground for the argument that the effect of s. 3 of the Act of 1846 was qualified by the Act of 1848.

I move your Lordships to dismiss this appeal.

EARL OF HALSBURY. My Lords, I agree in the judgment of the Lord Chancellor and in the reasoning on which it is founded.

LORD ASHBOURNE. My Lords, I agree.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I agree in the result at which the Court of Appeal has arrived. But I am unable to adopt the main ground of their decision.

It appears to me that the proviso at the end of s. 1 of the Act of 1846 (9 & 10 Vict. c. 66) must apply to illegitimate as well as to legitimate children.

The Act of 1846 (s. 8) is to be construed as one Act with the Act of 1834. The Act of 1834 contains many references to illegitimate children, or "children that are born bastards." The word "person" in the proviso includes females as well as males, and (I suppose) single women as well as women lawfully married. It seems to me that the expression "any person who shall have . . . . children having no other settlement . . . . than . . . . her own" is just as applicable to an unmarried woman with children as it is to a widow in a like case. It must include both, unless violence is done to the language of the enactment or some qualification introduced which is not expressed.

Vaughan Williams L.J. seems to have been much influenced by the consideration that, although "a long time has elapsed since 1846," yet "apparently there is no case in the books in which" the "point has been raised." I rather doubt whether that circumstance really makes in its favour. The ground is not virgin soil. It has been explored, and explored with care. Your Lordships will remember that the proviso was considered in the case of *West Ham Union*. (1) The pauper there was legitimate. But the real question was whether the decision in *Reg.* v. *Leeds Union* (2) could be supported. Now in the *Leeds Union Case* (2) the pauper was illegitimate. The whole question turned on the effect of the proviso. It did not occur to anybody—counsel or judge—that the proviso did not apply to illegitimate children. The proviso was minutely criticized by Lord Herschell L.C. and fully considered by Lord Halsbury. In a case where the pauper was illegitimate the House held that the proviso did apply. True, the point which found favour with the Court of Appeal in the present case had not then been discovered. But I should rather hesitate before I could come to the conclusion that a point which Lord Herschell missed and Lord Halsbury overlooked was in any case a safe and sufficient ground of decision.

I agree, however, with the Lord Chancellor that s. 3 of the Act

(1) [1894] A. C. 230. (2) (1879) 4 Q. B. D. 323.

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of 1846 suffices to dispose of the case. Vaughan Williams L.J. put that section aside on the ground that "it was aimed only at the prevention of the breaking up of families." That was the very ground on which the Court of Queen's Bench and the Court of Appeal in the *Leeds Union Case* (1) gave the go-by to the proviso in s. 1 of the Act of 1846. But the argument was summarily disposed of by Lord Herschell L.C. (2): "It is one thing," he said, "to come to the conclusion that the Legislature had a certain object in laying down a particular rule. It is quite another to confine the rule in the manner suggested, where no such words of limitation are to be found in the enactment itself."

It must, I think, now be held settled that unemancipated residence for the statutory period confers a settlement except when the proviso applies and qualifies the status of irremovability. Now if the mother were alone to be considered, as she would be removable, the children would be removable also, and so they could not have gained a settlement. But during each of the three years making up the period required to confer a settlement they were residing with their putative father, as well as with their mother. He was irremovable, so they were irremovable too; and thus they gained a settlement in Lambeth, where their residence with the father as well as with the mother was continuous.

LORD JAMES OF HEREFORD. My Lords, on May 13, 1904, the appellants in this case obtained an order of justices adjudging that five illegitimate pauper children had a legal settlement in the parish of Charlton-next-Woolwich, in the respondent union, and such union was directed to receive and provide for such paupers, and, a special case being stated, a Divisional Court of Queen's Bench supported the order, holding the respondent union to be liable to support the children. But on appeal that decision was reversed. From such judgment of the Court of Appeal the guardians of Fulham have appealed to your Lordships' House. The facts existing in the case are simple and uncontested.

In the year 1884 a married woman, one Rosa Turpin, left her

(1) 4 Q. B. D. 323. (2) [1894] A. C. 239.

husband and lived and cohabited with a man named John Johnson, by whom she had seven children. Rosa Turpin and Johnson for many years resided in the parish of Lambeth, and the children were born there. During this time the husband of Rosa Turpin resided within the union of Woolwich under such circumstances as made him irremovable therefrom and settled therein.

In 1903 five of these illegitimate children, all under sixteen years of age, became chargeable to the parish of Fulham, having resided there for less than a year.

The question raised by the special case, and which has now to be determined by your Lordships, is whether these five illegitimate children are or are not settled in the union of Woolwich or in the parish of Lambeth.

Simply stated, the present appellants contend that the children, being illegitimate, obtained no personal settlement, but could only obtain one through their mother, and that she must take that of her husband, William Turpin, who had acquired a settlement within the respondent union. It will be observed that neither the children nor their father or mother, since the birth of the children, had resided within the Woolwich Union.

The question before your Lordships is not easy of solution; it depends upon the construction to be put upon several statutes.

By the 4 & 5 Will. 4, c. 76, s. 71, it was enacted "that every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen or shall acquire a settlement in its own right." At the time of the order none of the five children had attained sixteen, so, unless they have acquired settlements in Lambeth, they will take the settlement of the mother, and so the question to be determined is whether the children had acquired settlements of their own.

This depends upon the construction to be placed upon the further statutes of 1846 and 1848 and upon the Divided Parishes Act of 1876. I can best express my own opinion by stating that I concur in the statement of the effect of those statutes, and of their application to the facts of this case, found in the judgment of Stirling L.J., delivered in the Court of Appeal.

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I wish also to say that I concur in the opinions expressed in the Court of Appeal, that "person" in the Acts of 1846 and 1876 refers alike to unemancipated and emancipated persons.

For these reasons I think that the judgment of the Court of Appeal should be affirmed.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 4, 1907.

Solicitors: *T. Blanco White; Callard & Vulliamy.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 — *June* 19.

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD . . . . APPELLANTS;

AND

BENSTED (SURVEYOR OF TAXES) . . . . . RESPONDENT.

Revenue—Income Tax—Sewer—Vested in Local Authority—"Hereditament"—"Capable of actual Occupation"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 60; *Sched. A, Rules I., III.*

A sewer was made, controlled by, and vested in a local authority in pursuance of statutory powers. It was rated to the poor rate. The local authority made no profit or gain out of it. The cost of making and maintaining it was paid for by a public loan repayable by annual instalments. The moneys for the repayment were found partly by contributions levied from neighbouring district councils whose sewage went through the sewer and partly from rates; and this was the only income. Upon an assessment to income tax as to a portion of the sewer:—

Held, that the local authority was chargeable to income tax in respect of the annual value of that portion of the sewer as a hereditament capable of actual occupation under the Income Tax Act, 1842, s. 60; Sched. A, Rule I.

Decisions of Walton J., [1906] 1 K. B. 294, and of the Court of Appeal, [1907] 1 K. B. 490, affirmed.

THE sewer in question was made and maintained by the appellants under the circumstances set forth in the reports of

the decisions below, and also in the report of *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee* (1), where it was held that the sewer was rateable to the poor rate in respect of that part of it which was in question in the present appeal. The sewer passed through and over land in the parish of Rumney, in the county of Monmouth, and was about seventeen and a quarter miles in length. The Rumney portion was about two and a half miles in length.

The appellants were assessed to the income tax in respect of the Rumney portion at 800*l.* gross. The rack rental at which the lands adjoining were worth to be let by the year did not exceed 2*l.* per acre.

The Income Tax Commissioners held: 1. That the appellants' concern did not fall within the Income Tax Act, 1842, s. 60, Sched. A, Rule III., and was not chargeable as a whole in respect of its profits in accordance with the rules prescribed by Sched. D. 2. That the appellants were chargeable in respect of the portion of their sewer and works situate in Rumney under Sched. A, Rule I. 3. That there was no evidence of the gross annual value of the subject-matter of assessment other than by reference to the annual value as stated in the poor rate assessment sustained by the *Newport Case.* (1) This decision was confirmed by Walton J. and the Court of Appeal (Collins M.R., Cozens-Hardy and Farwell L.JJ.). Hence this appeal.

Danckwerts, K.C., and *S. T. Evans, K.C.* (*Redman* with them), for the appellants. The appellants are not assessable to income tax in respect of their undertaking. They are a public body corporate precluded from making any profit. Profit or gain is of the essence and basis of income tax. As Lord Macnaghten said, it "is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. . . . . It is a tax on 'profits or gains' in the case of duties chargeable under Sched. A and everything coming under that schedule—the annual value of lands capable of actual occupation, as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the

(1) [1901] 1 K. B. 406.

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case of the other schedules of charges": *London County Council* v. *Attorney-General.* (1) There are here no "profits or gains" at all. In the case of the *Glasgow Corporation Waterworks* (2) Lord President Inglis said of the corporation: "They had not in view certainly to make profit by the undertaking. On the contrary, what they have distinctly in view is to pay money in order to obtain this particular benefit. They are not, therefore, trading in any commodity, nor are they entering into any undertaking for the use of property that is to be attended by a resulting profit or a beneficial interest accruing to any individuals or to any corporation." So in *Glasgow Corporation* v. *Miller* (3) the assessment was confined to the extra municipal supply beyond the area of compulsion and to supply for trade purposes. The same principle was enforced by Palles C.B. in *Dublin Corporation* v. *M'Adam.* (4) In *Attorney-General* v. *Black* (5) Blackburn J. confines the liability to cases of "property or profit." In *Paddington Burial Board* v. *Inland Revenue Commissioners* (6) the "profit" only was held assessable. The expenses of the appellants are far in excess of their revenue. This assessment is on the rack rent, based on Rule I. of Sched. A, which makes rack rent or annual value the standard. But there is no "annual value," and the theory of the hypothetical tenant is not applicable. The case of a sewer is widely different from that of a board school. It cannot be said that the drainage board is in "actual occupation" of the sewer.

The question, moreover, is not merely one of actual occupation. It must be profitable occupation. The Court of Appeal have failed to distinguish between "beneficial" and "profitable." The distinction is pointed out by Lord Herschell L.C. in *London County Council* v. *Erith Churchwardens.* (7) This sewer is "struck with sterility when in any and everybody's hands so that no profit can be derived from the occupation of it": per Bowen L.J. in *West Bromwich School Board* v. *West Bromwich*

(1) [1901] A. C. 26, 35.
(2) (1875) 1 Tax Cases, 28, 48; 12 Sc. L. R. 466.
(3) (1886) 2 Tax Cases, 131; 23 Sc. L. R. 285.
(4) (1887) 20 L. R. Ir. 497.
(5) (1871) L. R. 6 Ex. 308.
(6) (1884) 13 Q. B. D. 9.
(7) [1893] A. C. 562, at pp. 581, 585, 587, and 591.

Overseers. (1) This language was approved by Lord Herschell in the *Erith Case* (2), which was a case of rating, not income tax. "Profits or gains" are alone assessable under all the schedules, as Lord Davey pointed out in the *London County Council Case*. (3) Moreover, the land through which the sewage carrier passes is already assessed according to its value upon the owners and occupiers. If the sewer comes within the liability to income tax at all, it falls under Rule III. of Sched. A, and then it is a case of no profit, no tax.

Sir J. Lawson Walton, A.-G., and *Sir R. B. Finlay, K.C.* (*W. Finlay* with them), for the respondent. The question is not whether profit is derived from the sewer, but whether it comes under the language of the Acts. It is clearly a "hereditament" within the meaning of s. 2 of the Act of 1853, Sched. A, and therefore liable to duty. There is a considerable area of land and a solid structure built at great expense in performance of a statutory duty. Of this land and structure the appellants have the use, and under s. 63, Rule IX. sub-rule 2, of the Act of 1842 must be "taken and considered . . . . as the occupier." The appellants come within the words of Sched. A, Rule I., of the Act, and are assessed on these hereditaments. The subject of taxation under Sched. A is annual value, not profits. The words of Rule III. are wholly inapplicable, and the word "drains" in the context in which it occurs cannot include a sewer such as that of the appellants. The words "carrying on the concern" can only point to a business, from which there is an annual distribution of profits in the way of money. The analogy drawn by Cozens-Hardy L.J. of a quarry worked by a landowner for the purposes of his estate holds good. There would be no receipt of profits, for the assessment would be under Rule I., and not under Rule III.

S. T. Evans, K.C., in reply.

Earl of Halsbury. My Lords, I think in this case the judgment of the Court of Appeal ought to be affirmed.

It appears to me that there is a mixture, not to say a confusion, of thought in using the word "profits" in a sense which is not

(1) (1884) 13 Q. B. D. 929, 943.
(2) [1893] A. C. 562, at pp. 581, 585, 587, and 591.
(3) [1901] A. C. 26, at pp. 41, 45.

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consistent with the mode in which it is used in the statutes relating to income tax. It may be—I do not propose to controvert the idea—that in an ordinary sense there might be some difficulty in saying what are "profits," but really it seems to me every part of the argument here has been covered by authority. In the first place it is clear there is an occupation, and in the next place it is clear there is a beneficial occupation.

The alternative suggested, namely, that this is one of those excepted undertakings, the only colour for which is that the word "drain" is used in the excepting section, is to my mind untenable. The word "drain" used by itself might perhaps bear the meaning that it is suggested by the appellants it ought to bear, but when you look at the mode in which the word "drain" is introduced and the other words with which it is associated, you see that its meaning depends upon a very familiar canon of construction that, where you have a word which may have a general meaning wider than that which was intended by the Legislature, when you find it associated with other words which shew the category within which it is to come, it is cut down and overridden according to the general proposition which is familiarly described as the ejusdem generis principle. Accordingly the word "drain' used in that sense is not included in the excepted businesses which are described in the section so as to make the word "drain" applicable to the present question. Then if it is not, the rest seems to me to be perfectly clear, because you have here a beneficial occupation, and by the rules applicable to Sched. A you have to take a hypothetical tenant and to calculate the rent which the hypothetical tenant would give if he were called upon to get rid of this sewage, ascertaining it by the mode by which that is to be calculated and by the machinery by which the Legislature has supposed that somewhat difficult problem is to be solved.

My Lords, I really do not feel it necessary to do more than say that I concur with the judgments that have been delivered on this subject by every judicial person before whom it has come. I cannot forbear from pointing out that the Attorney-General in the course of exactly seven minutes appeared to me to dispose of the whole day's argument with which we have been entertained. I

must say I congratulate him, and I am endeavouring to emulate his success by the length of the judgment which I am now delivering.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I agree that the judgment is right, and I think the controverted subjects have been accurately and adequately discussed in the Court of Appeal.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 19, 1907.

Solicitors: *Wrentmore & Son, for Morgan, Bruce & Nicholas, Pontypridd; Sir F. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

OWNERS OF STEAMSHIP CANNING . . APPELLANTS;

AND

OWNERS OF STEAMSHIP BELLANOCH . RESPONDENTS.

THE BELLANOCH.

Collision—"Not under command"—"Aground"—Regulations for Preventing Collisions at Sea, 1897, *arts.* 27, 28.

A collision occurred between the steamships *Bellanoch* and *Canning*. The *Canning* was held to be alone to blame. It being alleged that the *Bellanoch* was also to blame because she had neglected to give three short blasts, as required by art. 28 of the Collision Regulations, when going full speed astern:—

Held, that the *Bellanoch* was not to blame, because even if the circumstances had brought her within art. 28 the neglect could not have affected the action of the *Canning*.

Decision of the Court of Appeal, [1907] P. 170, affirmed.

THE collision in question took place in the circumstances related in the report of the decisions below.

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Aspinall, K.C., and *Horridge, K.C.* (*A. D. Bateson* with them), for the appellants. The *Bellanoch* committed a breach of art. 28 in not sounding the blasts required on each occasion of her putting her engines full speed astern, and must therefore be held to blame. It is not enough for the respondents to prove that this omission did not contribute to the collision. In *The Duke of Buccleuch* (1) this House expressly approved the decision of the Judicial Committee in *The Fanny M. Carvill* (2), to the effect that it is not enough to prove that the disobedience to the rule did not in fact contribute to the collision. The person charged must shew that his infringement could not by any possibility have done so. Regulations for the prevention of collisions have always been enforced with the utmost stringency: *The Khedive.* (3) [They also cited *The Uskmoor* (4) ; *The Anselm* (5) ; *The Beryl.* (6)]

Cohen, K.C., *Laing, K.C.*, and *C. R. Dunlop*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, I think that the judgment of the Court of Appeal, confirming the judgment of the President of the Probate Division, ought to be affirmed. I hope I shall not say anything indicating any doubt as to the duty of obedience to the 28th article. The object of that article is to give information to another vessel, and it ought to be very strictly observed.

I incline to agree with Kennedy L.J. that in the peculiar and exceptional circumstances, inasmuch as both vessels were more or less in the mud, there was no obligation to give the signal until the *Canning* came to the buoys, after which there was in fact no default. But I will assume, though I will not affirm, that the duty of the *Bellanoch* was to sound three short blasts on each and every of the three occasions when, according to the log, she reversed her engines. I think if she had done so it could not in this case have affected the collision. The master of the *Canning* knew perfectly well what was the course of the

(1) [1891] A. C. 310.
(2) (1875) 13 App. Cas. 455, n.
(3) (1880) 5 App. Cas. 876, per Lord Blackburn, at pp. 891, 895.
(4) [1902] P. 250.
(5) [1907] P. 151.
(6) (1884) 9 P. D. 137.

Bellanoch and what her manœuvre was, and the whistle could not have told him anything he did not know already and could not have affected his action.

For those reasons I submit to your Lordships that this appeal ought to be dismissed with costs.

LORD ASHBOURNE. My Lords, I entirely agree with the judgment of my noble and learned friend the Lord Chancellor. I would be very sorry to say anything that would at all weaken the effect and stringency of the 28th article, but I think for the reasons indicated by my noble and learned friend on the woolsack it is avoided in this case.

LORD MACNAGHTEN. My Lords, I agree.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 2, 1907.

Solicitors: *Stokes & Stokes*, for *Thornely & Cameron, Liverpool; Lowless & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 *July* 4.

KRÜGER & CO., LIMITED . . . . . APPELLANTS;

AND

MOEL TRYVAN SHIP COMPANY, LIMITED RESPONDENTS.

Ship—Charterparty—Bill of Lading—Duty of Master to sign—Bill of Lading at variance with Charterparty—Liability of Shipowner to Holder of Bill of Lading—Indemnity by Charterer.

A charterparty contained a clause exempting the shipowner from liability for stranding and other accidents of navigation, even when occasioned by the negligence of the master; the master to sign clean bills of lading without prejudice to the charter. In mistake, and bonâ fide, the master signed bills of lading presented by the charterers which did not give the shipowner the exemption given by the charterparty. Owing to the negligent navigation of the master, there was a total loss of the cargo, and the holders of the bills of lading recovered damages against the shipowner:—

Held, that since the contract between the shipowner and the charterers was that the shipowner was not to be liable for the master's negligence, the charterers were bound to indemnify the shipowner against the claims of the holders of the bills of lading.

Decisions of Phillimore J., [1906] 2 K. B. 792, and of the Court of Appeal, [1907] 1 K. B. 809, affirmed upon the above ground.

THE facts raising the present appeal are stated in the judgments of Lord Loreburn L.C. and Lord James of Hereford, and in the reports of the decisions below.

May 15, 16. *Sir R. B. Finlay, K.C.* (with him *J. A. Hamilton, K.C.*, *Lush, K.C.*, and *A. H. Chaytor*), for the appellants. It was the duty of the master, who was the agent of the owners, to provide that the bills of lading should be in accordance with the charterparty. Both parties were in error in understanding that the effect of the words "all other conditions as per charterparty" was to incorporate the charterparty into the bills of lading. Those words, however, have been restricted in their application by a succession of cases: *Russell* v. *Niemann* (1); *Serraino & Sons* v. *Campbell* (2); *Diederichsen* v. *Farquharson*. (3)

(1) (1864) 17 C. B. (N.S.) 163, 177. (2) [1891] 1 Q. B. 283.
(3) [1898] 1 Q. B. 150.

It is no part of the charterers' duty to protect the interests of the owner. The bills were presented to the master for signature in good faith for his consideration and approval. The consequences of his mistake of law in signing the bills of lading in the form in which they were expressed cannot fall on the charterers. It is not correct to say that the master must sign any bill of lading which is presented to him, or at least justify his refusal; he may exercise his discretion: *Hansen* v. *Harrold* (1) has been misunderstood. The master has large powers in respect of the bills of lading which he signs: *Grant* v. *Norway*. (2) His duties are defined in large terms by Lord Watson in *Stumore, Weston & Co.* v. *Breen* (3); he is bound to acquaint himself with all the facts and circumstances before he signs a bill of lading. In the same case Lord Fitzgerald cites with approval the language of Field J. and Bowen L.J. to the effect that the master must use care and skill in examining bills of lading: see also *Hyde* v. *Willis* (4) and *Turner* v. *Haji Goolam Mahomed Azam*. (5) *Rodocanachi* v. *Milburn* (6) was a case arising out of the improper insertion of the negligence clause in the bill of lading; but Lord Esher cites, as illustrating the powers and duties of the master, Lord Bramwell's words in *Sewell* v. *Burdick* (7), and says, "Although as between the shipowners and the charterers the bill of lading is only a receipt for the goods, it will be the contract upon which the holder of the bill of lading to whom it is indorsed must rely as between himself and the shipowner." *Oriental Steamship Co.* v. *Tylor* (8) is inapplicable, because the liability of the charterers arose from their own negligence in failing to present bills of lading in accordance with the charterparty. Here the negligence was the master's and not the charterers'. There was no warranty, expressed or implied, on the part of the charterers that the bills of lading conformed to the terms of the charterparty, and therefore those authorities—of which *Dugdale* v. *Lovering* (9), *Birmingham and District Land Co.* v. *London and North-Western*

(1) [1894] 1 Q. B. 612.
(2) (1851) 10 C. B. 665.
(3) (1886) 12 App. Cas. 698, 702.
(4) (1812) 3 Camp. 202.
(5) [1904] A. C. 826.
(6) (1886) 18 Q. B. D. 67.
(7) (1884) 10 App. Cas. 74, 105.
(8) [1893] 2 Q. B. 518.
(9) (1875) L. R. 10 C. P. 196.

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Ry. Co. (1), and *Sheffield Corporation* v. *Barclay* (2) are the leading examples—have no application. There was no request on the part of the appellants from which an indemnity can be inferred in favour of those who complied with the request. The respondents' loss was caused by a mere mistake on the master's part in the exercise of the powers conferred upon him by the respondents.

Scrutton, K.C., and *Bailhache*, for the respondents. The charterparty is the contract, and the only contract, between the owners and the charterers; and the owners are not bound in respect of the charterers by bills of lading which they have not approved and which the master, in excess of his authority, has signed. The error in law into which both the charterers and the master fell cannot prejudice the owners. The latter cannot be held responsible for the bills of lading. The master had authority to sign "clean" bills of lading—an expression which imports that he is to sign nothing to the prejudice of his owners. The master is the owner's agent, it is true, but his authority is limited. In *Grant* v. *Norway* (3) Jervis C.J. said: "He may make contracts for the hire of the ship, but cannot vary that which the owner has made." Cases like *Stumore, Weston & Co.* v. *Breen* (4), which deal with the mutual rights and obligations of the master and his owners, have no application as between owners and charterers. Equally remote is *Sewell* v. *Burdick* (5), which is concerned with the relations of the holders of the bills of lading and of the owners. Between these parties the bill of lading may be the contract. But these were not the respondents' bills of lading, and were neither signed nor approved by them. The appellants induced the master to sign them, and the loss has arisen from the indorsement by the appellants to third parties. The present case is precisely similar to *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Co. of London* (6), where the charterers were held liable to indemnify the shipowners. *Hansen* v. *Harrold* (7) is really to the same effect, as the charterers were

(1) (1886) 36 Ch. D. 650.
(2) [1905] A. C. 392.
(3) 10 C. B. 665, 687.
(4) 12 App. Cas. 698, 702.
(5) 10 App. Cas. 74.
(6) [1900] 2 Q. B. 540.
(7) [1894] 1 Q. B. 612.

held liable for the difference between the value of the shipowners' lien and the ultimate liability. *Shand* v. *Sanderson* (1) is also favourable to the respondents.

The bills of lading were prepared by the charterers and presented to the master for his signature. That amounted to a request, and those authorities in which it has been held that a request imports an indemnity in favour of those who comply therewith are directly applicable. The principle was laid down by Lord Halsbury and Lord Davey in general terms in *Sheffield Corporation* v. *Barclay* (2), and was affirmed in *Dugdale* v. *Lovering* (3) and *Birmingham and District Land Co.* v. *London and North-Western Ry. Co.* (4)

Sir R. B. Finlay, K.C., in reply. The master was the respondents' agent, and it was the duty of the respondents to instruct the master to take care that the bills of lading should conform to the charter. It was held in *Turner* v. *Haji Goolam Mahomed Azam* (5) that bills of lading are contracts binding on the owners.

The House took time for consideration.

July 4. LORD LOREBURN L.C. My Lords, this case raises a novel point.

The respondents, shipowners, chartered their vessel under a charterparty which relieved them from liability for negligence of the master, and with the following clause: "The master to sign clean bills of lading for his cargo, also for portions of cargo shipped (if required to do so) at any rate of freight, without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading."

The vessel was under the terms of the charterparty to proceed to Rangoon, and there load from the charterers a cargo of rice and thence proceed to Rio. She went to Rangoon and loaded the rice. Charterers' agents then presented bills of lading

(1) (1859) 4 H. & N. 381.
(2) [1905] A. C. 392.
(3) L. R. 10 C. P. 196.
(4) 36 Ch. D. 650.
(5) [1904] A. C. 826.

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to the master. These bills of lading contained the words "freight for the said goods and all other conditions as per charterparty," but did not incorporate the exception contained in the charterparty exempting the shipowners from liability for negligence of the master. Accordingly, under these bills of lading, the owner was in law liable to whosoever might have the right to sue on them for the consequences of this negligence. The agents did not realize this, nor did the master, who duly signed the bills. Both were mistaken in law, and both acted in good faith. Unfortunately the cargo was lost through the negligence of the master, and the owners were compelled to pay the value of the cargo in an action brought by the indorsees of those bills of lading. Having paid it, they brought this action against the charterers, claiming to be indemnified.

In my view the cardinal fact which ought to govern our decision is that under this charterparty the shipowners are not to be liable for losses caused by the master's negligence in navigating the vessel. When bills of lading are given they may give rise to rights in persons other than the charterers and on conditions other than those contained in the charterparty; and therefore it is the duty of the charterers who have to present these bills, to provide that they shall not expose the shipowners to risks from which by contract they are to be exempt. Nothing has occurred that disentitles the shipowners to this protection. The master, who signed the bills of lading under an excusable error of law, did not waive his principals' right to be so protected, nor did his principals waive it. It is not a case of warranty. It is a case in which, by contract, the shipowners undertook to carry a cargo on the footing that they were not to be liable for the master's negligent navigation, and the charterers have made them so liable by the bills of lading. Hence arises a duty to give adequate indemnity.

Accordingly I move your Lordships to dismiss this appeal.

EARL OF HALSBURY. My Lords, in this case it is common ground that the ship chartered by the defendants was lost by the negligence of the master. In the charter it is provided that the right of action which the common law would have given to

the cargo owners is as a matter of contract between the shipowner and the merchant taken away, and as between themselves no liability could be insisted on. But the merchants, who in the charter were to present bills of lading, and to present bills of lading which were to conform to the charterparty, did in fact present bills of lading which were supposed to preserve the indemnity of the shipowners, but as matter of law did not do so. The master, in answer to the question "Do you mean you have never seen a negligence clause incorporated in a bill of lading before this voyage?" replied, "It is included in the charterparty always"; and it is clear that he supposed the negligence clause of the charterparty was included in the bill of lading by virtue of the words "all other conditions as per charterparty," whereas for a considerable number of years it has been decided that it is not. The result has been that the shipowner has been compelled to pay between 12,000*l.* and 13,000*l.*, a sum which would indeed have been some thousands more but for the provision as to the limitation of liability. I cannot doubt that the cause of this loss was the signing by the master of a bill of lading which did not incorporate the indemnity against the master's negligence. The bill of lading was tendered by the defendants and signed by the master in ignorance of its true legal effect. I agree with Sir Gorell Barnes that the defendants were bound by their contract to tender a bill of lading if they thought proper to do so, and that such bill of lading ought to have incorporated in terms what has been called the negligence clause. I think it is their breach of contract that has occasioned the loss. I think there was a contract by them that if the master signed a bill of lading at their request it should not be in the form of a contract which would strike out the negligence clause.

My Lords, as different reasons have been discussed and assigned for the ground upon which the charterers ought to be made liable, I wish to say, inasmuch as I do not concur in some of the reasons given, that I am of opinion that the liability arises from the contract relations between the shipowners and the charterers, and I desire to express my concurrence in what all the three members of the Court of Appeal said on this

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subject: I mean the one point as to whether or not this is a matter of contract between the parties. The President of the Probate and Admiralty Division said: "The contract is that the bills of lading shall be in accordance with the contract contained in the charter"; and later on he says: "The charterers having been bound in my opinion to present bills of lading which carried out the charterparty, they have committed a breach of their contract, and they have done that which, although they were quite mistaken about the matter and did it without any improper intention, in fact cast a greater obligation upon the shipowner than he ought to have had cast upon him, and to my mind the damages flow as a matter of course from that position in this case, having regard to the circumstances under which the loss occurred and the action was afterwards brought." Farwell L.J. says: "There is an express contract to tender for execution a proper bill of lading in conformity with and so as not to prejudice the actual charter." Buckley L.J. says: "The charterer ought to have tendered to the master for signature bills of lading such as would be consistent with the charterparty; if he tendered to him other bills of lading not consistent with the charterparty, then the charterer committed a breach of contract in so doing."

My Lords, with those judgments, and especially with that part of them which lays the obligation which has been so described upon the charterers, I heartily concur.

The bill of lading cannot control what has been agreed upon before between the shipowner and the merchant and what has been expressed in a written instrument which is the final and concluded agreement between the parties. It is in truth a bill of lading; it is somewhat inaccurately described as a contract in the Bills of Lading Act, but Bramwell L.J. said in *Wagstaff* v. *Anderson* (1) that "to say it is a contract superseding, adding to or varying the former contract under the charterparty is a proposition of law to which I never can consent."

When it is said that the master must sign any bill of lading submitted to him, I cannot agree. If the bill of lading tendered is manifestly inconsistent with the charterparty, I think it

(1) (1880) 5 C. P. D. 171, 177.

would be his duty to refuse, but if there is nothing to excite his suspicion it is, of course, his duty to sign the bill of lading tendered to him. And in this case I do not quite follow the observations which have been made to the effect that it was the common mistake of both the charterers' agents and the master which led to the catastrophe. Both of them may have been ignorant of the state of the law, although it has been settled as long ago as 1864 by a judgment delivered by Willes J., Byles and Keating JJ. concurring. (1) It may be true as a fact that both the charterers' agents and the master were ignorant of the state of the law, but if so, it is an irrelevant fact. The truth of the matter I take to be this: the contract is that if a merchant desires, for the purpose of selling his goods or for any other reason, to have the bill of lading signed, it is the charterer's duty both to prepare and to present for signature the bill of lading, but then he must present such a bill of lading to the master as is not inconsistent with and not to the prejudice of the charterparty.

For these reasons I am of opinion that the appeal ought to be dismissed.

Lord James of Hereford. My Lords, the facts of this case are either admitted or clearly proved.

The respondents being shipowners chartered a vessel, the *Invermore*, to the appellants to load a cargo of rice at Rangoon for carriage to Rio.

By clauses 6 and 7 of the charterparty the shipowners were exempted from liability for collisions, stranding, and other accidents of navigation, even when occasioned by the negligence of the master, and the master was to sign clean bills of lading without prejudice to the charter.

After the execution of the charterparty the charterers sold the intended cargo to merchants. That cargo was loaded on the vessel at Rangoon, and the charterers thereupon drew and presented the bills of lading to the master for signature. The bills of lading contained the words "and all other conditions as per

(1) *Russell* v. *Niemann*, 17 C. B. (N.S.) 163, 177.

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charterparty," but the exemption from liability clause was not referred to. Perfect good faith existed on both sides.

Doubtless those who drew the bills of lading intended to make them agree with the charterparty, and the master probably trusted to the view they took of the matter. The mistake relied upon arose in consequence of everybody being ignorant that the legal authorities had decided that similar words to those in the bills of lading did not introduce into them the exemption clause in the charterparty.

The bills of lading were duly indorsed to the purchasing merchant. On the voyage the vessel was lost through the negligence of the master. An action being brought by the indorsees of the bill of lading against the shipowners on account of such negligence, a sum of 12,157*l.* was recovered.

The present action is brought by the shipowners seeking to be recouped by the charterers in respect of these damages, on the ground that their liability as between them, the shipowners, and the charterers ought to be governed by the terms of the charterparty only, and although they, the shipowners, are liable to the indorsees of the bills of lading on those documents as signed by their agent the master of the ship, yet the rights of the original contractors were governed by other considerations.

In support of this view the shipowners say, It is true the master is our agent, but he is our agent to act within the charterparty and according to its terms. You, the charterers, had imposed upon you the duty of framing the bills of lading. Innocently you drew them in a wrong form and presented them to the master, who equally in ignorance carried out your action and signed the bills; when he did so he was not acting within his authority.

I think it is clear that as between the charterers and shipowners the terms of their contract must be found in the charterparty.

That the bills of lading came into existence for the convenience and business purposes of the charterers is also clear. Shipowners have only to carry. They care not for whom, and have nothing to do with the terms upon which the charterers deal with their goods.

But to the charterers it is all-important that they should obtain bills of lading which they can indorse over and so transfer the property in the cargo. Of the terms of such transfer the shipowner knows nothing, and thus from the nature of things and from the course of business the charterers prepare the bills of lading and tender them to the master of the vessel for signature. And so it comes that the charterers, who are controlled by the charterparty and acting under it, have cast upon them the primary duty of tendering to the master bills of lading in accordance with the terms of that document. They had no right to ask the master to sign a bill of lading in any way deviating from the charterparty.

In this case the charterers prepared the bills of lading with the intention of conforming with the charterparty. The mistake was innocently made in ignorance of legal decisions. And so with the master: he in like ignorance honoured the request of the charterers, thinking that both he and they were acting within the authority of the charterparty. Now the effect of the mistake is obvious. If the bills of lading had been properly framed the shipowners would have been free from any liability for the negligence of the master. The mistake in the drawing of the bills of lading renders them so liable.

The point to be determined is a narrow one, and argument on either side can be found; but my view is that the weight of argument lies with the respondents, and that they are entitled to your Lordships' judgment.

By contract and by course of business the charterers undertook that the bills of lading they presented to the master should be in accordance with the charterparty. They failed in this respect, and by that failure the respondents were rendered liable for the loss occasioned by the negligence of the master.

It is true that the master of the vessel accepted and signed these bills of lading, but he had no authority to sign bills of lading in the form presented to him. The charterers, the appellants, knew what the master's authority was, and I do not think that they can rely upon his unwitting acquiescence in their mistake so as to escape from liability.

I therefore think that the appeal must be dismissed with costs.

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LORD ATKINSON. My Lords, I concur in the judgment which has been given and in the reasoning on which it is founded. I emphasize the latter, because I wish to guard myself against being supposed to concur in all the conclusions at which the Court of Appeal arrived, or in the lines of reasoning by which they were arrived at. I especially wish to guard myself against being supposed to concur in the conclusion that the act of a master of a ship in signing a bill of lading is purely ministerial. I think he is entitled to exercise his judgment on the question of the conformity of the bill of lading with the charterparty, and, if he should think they do not agree, to refuse to sign the bill of lading, of course at the risk of his employers.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 4, 1907.

Solicitors: *Hollams, Sons, Coward & Hawksley; Holman Birdwood & Co.*

[HOUSE OF LORDS.]

MURRAY AND ANOTHER . . . . . APPELLANTS;

AND

DUNN AND OTHERS . . . . . RESPONDENTS.

H. L. (Sc.) 1907 *May* 13.

Servitude—Construction—Bond to secure Amenity—Meaning of the Word "unseemly" in a Bond of Servitude.

The pursuers, proprietors of a feu, raised an action against the defenders, the proprietors of an adjoining feu held of the same superior, to enforce building restrictions. These restrictions were contained in a bond of servitude, by which the defenders bound themselves and their successors not to erect on any part of an adjoining piece of ground "any building of an unseemly description." The pursuers alleged that the defenders were about to allow the erection of unseemly buildings within the meaning of the bond of servitude:—

Held (affirming the decision of the First Division of the Court of Session), that a condition against the erection of buildings of "an unseemly description" was too vague and indefinite to be valid as a permanent restraint on the use of property.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellants Catherine I. Murray and another were heritable proprietors of subjects in Edinburgh known as St. Margaret's Tower. The respondents were Agnes Dunn and others, trustees of the convent of St. Margaret's, which adjoins St. Margaret's Tower. The other respondent was one Wilson, who proposed, with the consent of the trustees of the convent, to erect the tenements the subject of the action.

The question in the appeal was whether the buildings proposed to be erected by the respondents were "unseemly" buildings within the meaning of a bond of servitude. The property of the appellants and respondents originally formed part of the estate of Whitehouse, which was feued out subsequent to 1850. One of the earliest feus was granted in 1855 to the late David Murray, C.A., and now belongs to the appellants. The subjects were described as measuring 1 acre, 1 rood, 2 poles, and 6¼ yards, and as consisting of lot 1 and a part of lot 2 on the general

(1) (1906) 8 F. 1109.

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feuing plan, and the charter and sasine contained conditions binding the feuar to erect within a certain period a good and substantial dwelling-house, or houses of a certain minimum value, upon a plan to be approved by the superiors, and providing that the ground lying round the house or houses should be formed into a garden or shrubbery, to be kept and maintained as such or in grass, and to be diverted to no other purpose except with the consent of the superiors, together with certain other provisions designed to secure amenity. In 1858 a feu of a triangular portion of ground lying immediately to the east of Mr. Murray's feu was granted to Bishop Gillis, who also held the title to St. Margaret's Convent, situated to the north of Mr. Murray's property. In the feu-charter to Bishop Gillis the subjects conveyed were described as measuring three acres and over, and as consisting of the eastmost portion of lot 2 and lots 3, 4, and 5 and the triangular piece of ground lying immediately to the east of lot 5 on the general feuing plan above mentioned, and the charter and sasine contained provisions that no more than four dwelling-houses or villas should be erected on the ground on plans to be approved by the superiors, and that in the event of stables or other offices being erected they should be built in such manner as not to interfere with the view or amenity of the adjoining feus. Shortly after obtaining his feu Mr. Murray erected on the eastern portion of his feu St. Margaret's Tower, a large and ornamental dwelling-house, and he laid out the grounds as a garden and shrubbery. He then proceeded to erect another villa on the western portion of his feu, adjoining the property of St. Margaret's Convent, when an agreement was entered into between him and Bishop Gillis which provided that Mr. Murray should convey to Bishop Gillis the portion of his feu upon which he was building in exchange for a portion of the convent ground lying to the north, and that both parties should submit to certain restrictions on building. The important clause of this agreement was that "no building of an unseemly description or nearer than thirty feet from Mr. Murray's eastern boundary wall should be erected on the ground to the east of Mr. Murray's property. This agreement was formally implemented in 1863 by various deeds duly recorded, and in particular by a bond of servitude, by which

the convent trustees who had succeeded Bishop Gillis as owners of the subjects on both sides of St. Margaret's Tower bound and obliged themselves and their successors in the triangular piece of ground, acquired in feu in 1858, lying to the east of Mr. Murray's subjects, in the following terms: "That we and our successors shall not erect on any part of the said triangular piece of ground any building of an unseemly description or nearer than thirty feet from the said David Murray's boundary wall." And they bound themselves to insert the said servitude and obligations in all future dispositions.

The triangular piece of ground lying to the east of the appellants' property had until recently remained unbuilt upon and in the possession of the convent trustees. In 1903 the convent trustees acquired the superiority of the subjects, and they then proceeded to feu out the ground for the erection of tenements in flats. An application was also made by the respondent Wilson to the Dean of Guild Court for warrant to erect two other tenements or houses immediately adjoining the appellants' property on the east. These were the tenements which the appellants alleged would be in contravention of the alleged servitude. According to the plans lodged in the Dean of Guild Court the proposed tenements were to be four storeys in height, and the end of one of them and the back of the other would face the appellants' property, which would thus be directly overlooked, at a distance varying from thirty to forty-six feet, by about sixty windows, mostly from kitchen sculleries and closets, with the usual accompaniments of external pipes, larders, and clothes lines. In these circumstances the appellants contended that the proposed buildings would utterly destroy the amenity of their property, and they raised this action to restrain the erection of the proposed buildings.

In the Court of Session the appellants argued two points: One that they and the convent trustees were feuars of a common superior feuing out his land according to a general plan, and each was entitled to the benefit of conditions in the charter of the other. On this point both Courts below were against the appellants, and it was not persisted in on the appeal. The second point argued by the appellants had reference to the question of

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servitude, namely, the express contract between the appellants' author and the late Bishop Gillis and the trustees of the convent, by which the Bishop and the trustees bound themselves and their successors not to erect on the ground in question (called a triangular piece of ground) "any building of an unseemly description"; and this was the point on which the appeal was brought. The appellants contended that the tenements the respondent Wilson proposed to build would be a contravention of the servitude.

The Lord Ordinary (Lord Ardwall) held that the proposed buildings were in contravention of the alleged servitude; but this decision was reversed by the First Division of the Court of Session on July 19, 1906. (1)

Lord Kinnear, who gave the judgment, which was agreed to by the Lord President and Lords M'Laren and Pearson, said on the second point: "The Lord Ordinary has held that, 'having regard to the locality in which the tenements are to be erected, namely, a villa locality, and their proximity to the pursuers' handsome villa residence and grounds, these tenements must be regarded as unseemly buildings within the meaning of the bond of servitude.' With great respect I am unable to concur in this opinion. I agree that the tenements described may very probably detract something from what is called the amenity of the pursuers' villa, and one must sympathize with their feeling of annoyance on finding that their prospect of trees and gardens is to be displaced by houses four storeys high. But these are disadvantages that are incident to residence in the outskirts of a growing city, and I am not prepared to say that, however vexatious, it is, according to the ordinary use of language, 'unseemly' that a row of tenements should be erected in the neighbourhood of a villa. If that is a point on which, as the Lord Ordinary's judgment shews, opinions may differ, it follows that the phrase is too ambiguous for the exact definition of a right of servitude. It is not an absolute but a relative term, which has no substantial meaning except in connection with some object, purpose, or character with reference to which something else is characterized as unbecoming or unseemly, and the bond of servitude provides no

(1) 8 F. 1109.

standard for the specific application of the term, unless it is to be found, as the Lord Ordinary finds it, in the character of the locality which he describes as a villa locality or in the handsome character of the pursuers' house. But the character of the locality is not fixed and unalterable, and we know that as matter of fact there are now a number of streets and tenements in the neighbourhood of the Whitehouse estate which were not foreseen in 1858. So shifting a standard is not sufficient for the exact definition of a permanent servitude, and we are thus brought back to the question whether it is unseemly that four-storeyed tenements should be built in the neighbourhood of a handsome villa. So far as my own opinion goes, I cannot say that it is unseemly; the utmost that can be said for the pursuers' case is that that is matter of opinion, and if there may be a reasonable difference of opinion as to the specific application of the terms in which a servitude is expressed to the facts of a particular case, it is not a well-defined servitude. I am not sure that the Lord Ordinary would have reached his conclusion but for his adoption of a principle of construction which with deference appears to me to be altogether inapposite. His Lordship says that 'in dubio the word and the clause in which it occurs must be so interpreted as best to carry out the intention' of the parties to the contract. But this is not a personal action upon a contract. It is a real action, and its purpose is to establish a permanent burden upon one piece of land in favour of another irrespective altogether of the relation on which the proprietor of either may stand towards the persons who made the contract. It is to restrain in perpetuity the exercise of the ordinary rights of property by successive proprietors who may in no way represent the contracting parties. The law as to the constitution of such permanent restrictions on the use of property is clearly expressed in the classical judgment of Lord Corehouse in *Coutts* v. *The Tailors of Aberdeen* (1): 'It is a familiar and long-established rule that the law of Scotland does not admit of any indefinite burden attaching to lands.' It is true that in the application of the rule Lord Corehouse distinguishes between indefinite money payments and servitudes, but that is because he

(1) (1840) 1 Rob. App. 296.

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selects the servitude as the best type of burdens that are definite and specific. The case of *Coutts*, however, was concerned with burdens which enter the title of the burdened land as conditions of the grant. The rule as to restrictions constituted by deed or contract extrinsic to the grant is more rigorous. It is stated by Professor Bell in a passage supported by many authorities, when, after distinguishing between burdens or privileges, which may be the subject of personal contracts, and the restrictions which the law will recognize as servitudes affecting singular successors, he says, with reference to the latter, it is 'essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements': Bell's Prin. s. 979. It may be said that the condition which, in the author's view, was essential is infeftment, and that the pursuers have the benefit of infeftment, because their bond has been recorded in the Register of Sasines in terms of the Titles Act of 1868. But the infeftment contemplated by Professor Bell was infeftment following upon a conveyance of land. I am not aware of any authority establishing that the registration of a written instrument which forms no part of the title to land will serve the same purpose, and I think that a dictum of Lord President Inglis in *Banks & Co.* v. *Walker* (1) is a high authority to the contrary. For his Lordship, rejecting a certain construction which it was proposed to put upon a contract, goes on to say: 'If such a restriction is to be found in the contract, there is no known servitude that puts such a restriction on the use of property, and no such restriction on the use of property can affect singular successors unless it enters their titles.' However that may be, and whether it enters the title or not, I am of opinion that a condition against the erection of buildings that are 'unseemly' is too vague and indefinite to be valid as a permanent restraint upon the use of property, into whose hands soever such property may come, and that the defect cannot be cured by any inference of intention to be gathered from a personal contract which does not affect singular successors. It is unnecessary to inquire whether the convent trustees are personally bound by the contract, because the other defender is

(1) (1874) 1 R. 981.

certainly a singular successor, and also because the declarator asked is to establish a permanent burden which will affect the land and its proprietors in all time coming."

May 13. *Scott Dickson, K.C.*, and *A. H. B. Constable* (of the Scottish Bar), for the appellants. The buildings objected to were four storeys high, and overlooked the appellants' property at a distance of only thirty feet; that in itself proved they were "unseemly" buildings. The object of the bond of servitude was to impose a permanent burden upon one piece of ground in favour of another. The predecessor of the appellants desired to secure that there should not be buildings which overlooked his grounds, and the phrase "unseemly" secured that object; buildings of four storeys would bring to the vicinity of the appellants' grounds a large population, and that was one reason why the proposed erection was "unseemly" within the agreement which constituted a servitude or burden on the respondents' land. There was no more common form of restriction on urban subjects than one which limited the building to houses of a certain character. As to the creation of a servitude, Lord Corehouse said, in *Coutts* v. *Tailors of Aberdeen* (1): "There is no need of a declaration that the obligation is real, that it is a debitum fundi, that it shall be inserted in all the future infeftments, or that it shall attach to singular successors. It is sufficient if the intention of the parties be clear, reference being had to the nature of the grant." The case of *Banks & Co.* v. *Walker* (2) was no authority against the appellants, as there the deed had not been recorded. [They also referred to Stair, 2, 5, 9; *Naismith* v. *Cairnduff* (3); *North British Ry. Co.* v. *Park Yard Co.* (4)]

W. Campbell, D.F., and *William Chree* (of the Scottish Bar), for the respondents, were not called upon.

Earl of Halsbury. My Lords, the question in this case is certainly reduced to a very simple one, and that is whether your Lordships are able to give a definite legal

(1) 1 Rob. App. 296, at p. 307.
(2) 1 R. 981.
(3) (1876) 3 R. 863.
(4) [1898] A. C. 643.

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meaning to the restrictive words of this covenant. I confess I have been looking in vain for some definite guide as to what is suggested to be the real meaning. Both the learned counsel who have addressed your Lordships have, I think, failed to give any definite meaning to the words. What may reasonably be "seemly" appears to be a question rather of the personal conduct of the individuals engaged than any characteristic of the building which is supposed to be itself an infraction of the covenant that has been entered into.

I really do not feel it necessary to say any more about the matter, except that I concur with the judgment of the Court of Session. I am wholly unable to follow the reasoning which alters the applicability of such words as are used here into some definite meaning which a Court can enforce.

For these reasons I move your Lordships that the appeal be dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I think this is a very clear case, but the law on this subject of servitudes affecting real property is one which requires delicacy of statement, and I shall most usefully express my opinion by saying that I entirely concur in the whole of the judgment of Lord Kinnear.

LORD ATKINSON. My Lords, I concur. I think the judgment of the Court of Session was right.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, May 13, 1907.

Agents for appellants: *Martin & Leslie, for Blair & Cadell, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, for William Considine, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

THE CLIPPENS OIL COMPANY, LIMITED . APPELLANTS; H. L. (Sc.) 1907

AND

THE EDINBURGH AND DISTRICT WATER TRUSTEES (ET È CONTRA) . . . . . RESPONDENTS. *June* 11.

Damages—Interdict too Wide—Measure of Damages.

An interim interdict was obtained by the defenders against the pursuers, a mineral company, who owned a large shale and limestone mineral field and also large works for extracting and refining oils. The interdict restrained the pursuers from working and winning the seams of the shale and other minerals within forty yards of the defenders' water-pipes, which passed through the pursuers' property. The interdict was in force for eleven months, when it was recalled. During the eleven months shale to keep the works going could have been obtained from other sources, but only at an expense which would not have been profitable. The pursuers' capital in hand was limited, and prices in the oil trade were at the lowest point. In these circumstances the pursuers closed their works, with the result that their machinery deteriorated, their business connections were lost, and it was found impossible to restart the works after the recall of the interdict.

In an action for damages for wrongous interdict, the First Division of the Court of Session gave the pursuers judgment for 27,000*l.* damages out of a claim for 137,000*l.* :—

Held (affirming the decision of the Court below), that the pursuers were not entitled to recover as damages the total loss consequent on the closing of their works; that both parties were in fault; and that the damages awarded were not insufficient.

APPEAL and cross-appeal from a decision of the First Division of the Court of Session, Scotland. (1)

The appellants, the Clippens Oil Company, Limited, were proprietors and tenants of the minerals, consisting of shale and limestone, in the estates of Straiton and Pentland, near Edinburgh, through which two main water-pipes of the respondents, the Edinburgh water trustees, passed. These pipes were the "Crawley" pipe, laid in 1825 under an Act of 1819, and the "Moorfoot" pipe, laid in 1876.

The mining works in Straiton had been worked since 1877, and those in Pentland from 1882. The latter was called the

(1) (1906) 8 F. 731.

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main seam and said to contain the richer shale. The mining was carried on by the "stoop and room" method. Frequently the workings came near the water-pipes of the respondents, causing interruptions, and the appellants found it necessary repeatedly to serve notices on the respondents under the Waterworks Clauses Act, 1847, of their intention to work the minerals adjacent to the pipes; but the respondents always refused to acquire any of the minerals. About 1896 the appellants, who had been working in what was known as the Broxburn seam, found it necessary to realize a considerable portion of the minerals standing in pillars under and within forty yards of the respondents' pipes running through the Pentland property. After various notices the appellants served notices in November, 1896, and January, 1897, of their intention to work out the said minerals. The respondents, acting on the assumption that no proper notices had been served upon them under the Waterworks Clauses Act, 1847, s. 22, and considering erroneously that the minerals must be left as they stood without compensation, for the alleged safety of their pipes presented a note for interdict in March, 1897, for the purpose of (inter alia) restraining the appellants from "working and winning the seams of shale and other minerals, and of limestone and fireclay in their lands of Straiton and in the lands of Pentland, leased to them, at any point within forty yards of the complainers' pipe tracks or lines of pipes, as shewn on the copy of the ordnance survey produced herewith; or at least from working, winning, and away taking, or in any way interfering with the pillars or stoops of shale and limestone left by the respondents and their predecessors, the Straiton Oil Company, Limited, in their workings on the said estates of Straiton and Pentland, so far as these pillars or stoops are under the complainers' pipe track and lines of pipes, or within forty yards thereof."

On March 16, 1897, the respondents having given security for damages, the interim interdict was passed by the Lord Ordinary (Lord Pearson); but after a proof the interdict was on September 18, 1897, altered to one granting interdict as to the limestone pillars in Straiton, but refusing the petition of the respondents as to the shale stoops and pillars. The respondents reclaimed to the First Division. On February 3, 1898, the First Division

refused the interdict as to both shale and limestone, and recalled the Lord Ordinary's interlocutor.

The position of the appellant company in 1897 appeared to be as follows: They had been in existence as a new company working the shale, &c., since 1893; they had had a bad time, the oil trade passing through a trying period; further, prices for oil were low, and the company's capital in hand was limited to about 14,000*l*. Previously the mine had been flooded, and there had been a crush in the main seam; but these difficulties had been met, and the company were in course of transferring their works from the Broxburn seam to the more profitable main seam at Pentland, adjoining and under the water-pipes of the respondents, when the latter obtained the above-mentioned interdict, causing the appellants damage for which they raised this action on May 6, 1898. The action lay dormant, because the respondents, who up to this thought their rights rested alone on the Waterworks Clauses Act, found out that that was not so, and raised an action for declarator that the "Crawley" pipe was equivalent to a grant of aqueduct and that the pipe in consequence was bound to be supported.

That question was carried through all the Courts up to this House, where the respondents' contention was given effect to. (1) After that decision this case was revived and a most voluminous proof was taken. As to the damage they had suffered, the appellants, in condescendence 8, alleged that "the whole available mining developments were closed, either immediately or within a few months from and in consequence of the granting of the interim interdict. It was found impossible, in consequence of the interdict, to carry on the shale mining and oil manufacture except at a ruinous loss, and the pits and works had to be closed on July 14, 1897. By this time the bing of shale, containing about 25,000 tons, which constituted a valuable insurance against strikes and mining risks, had been exhausted. The retorts had to be allowed to cool down and the refinery to stand, and thereby, and by remaining unused, to deteriorate, and about 1000 workmen had to be dismissed. These men had to seek employment elsewhere, and the mining and working

(1) [1901] A. C. 64.

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population which used to surround the pursuers' works, and live in the pursuers' houses, disappeared, to the great detriment of the said works. While heavy expense has been incurred in keeping the pits free of water, and maintaining the leading mines, the workings generally fell rapidly out of order, and large expenditure is necessary to bring them into the like working condition as they were in at the date of the interim interdict. The whole property and plant of the company, which was then in full productive order, suffered seriously by being brought to a standstill and thrown out of use. Not only has it in itself deteriorated, but extraordinary expense is now necessary to re-start it and bring it up to its former efficiency. Moreover, while the company had a large and increasingly profitable business, including a well-established and extensive business connection, not only has it been unable, owing to the interdict, to carry on its business, but the said connection itself has been lost, and much loss and outlay must now be incurred before it can be recovered and the company's business again restored to its profitable condition. The pursuers estimate their loss and damage on these heads at 137,000*l.*"

The respondents, in their statements of facts, alleged that the appellants' business had never been profitable, and that at the date of the interdict there were numerous working faces from which the appellants could have won shale and limestone beyond forty yards on each side of the Moorfoot pipe; but the working of the shale and limestone was unprofitable, and only carried on at a ruinous loss.

This action was originally raised on May 6, 1898, and subsequently to the litigation above-mentioned a question arose how long in law the interim interdict had been in force, in the circumstances that the respondents had lodged a reclaiming note, and the First Division held (1), in accordance with the unanimous decision of seven judges, to whom the question was referred, that the interim interdict in the facts continued in force from March 16, 1897, until the decision of the First Division on February 3, 1898, a period of six months longer than the Lord Ordinary adopted when he assessed the damages. The point as to the duration of the interdict was abandoned at the Bar.

(1) 8 F. 731.

The Lord Ordinary (Lord Pearson)—March 18, 1905—going through all the facts, found damages due to the appellants of 15,000*l.* out of their claim for 137,000*l.* The First Division, apparently assessing the damages on the same ratio as the Lord Ordinary, but holding that the interdict was six months longer in force than the Lord Ordinary held, pronounced an interlocutor on March 20, 1906, ordering the respondents to pay the appellants 27,000*l.* in the name of damages with costs. (1) Both parties were dissatisfied with these decisions, and appealed.

March 12, 13, 14, 18. *Rufus Isaacs, K.C., James Avon Clyde, K.C.* (with them *T. B. Morison, K.C.*) (the two latter of the Scottish Bar) for the appellants. The amount awarded by the First Division was a wholly inadequate compensation for the damage caused by the interdict. The operation of the interdict was so extensive that it stopped the appellants' works and caused the utmost ruin to their machinery. It was not an interdict precluding the appellants from working the minerals so as not to cause damage to the pipes, but an interdict which absolutely prevented them from working the shale. The respondents knew of all the appellants' embarrassments, and the fact that they had only a small capital. The real object of the respondents was to stop the pursuers' works, for if the company went into liquidation it would be easier to deal with them. The evidence shewed that the output from other parts of the mine was enormously reduced, and that the expenses in the ratio of the product rose to a very heavy figure. But for the interdict the appellants could have maintained the output long enough to save the company. As to the question of driving and working through levels under the water-pipes, that the appellants could not do without a breach of the interdict. Further, the respondents did all they could to prolong the interdict; for instance, they did not give notice of their reclaiming note to the First Division until the last moment. The result of their drastic interdict must have been foreseen by the respondents; and they are liable for the damage, amounting to 137,000*l.*, caused by their malice. [They cited *Emblen* v. *Myers* (2), *Bell* v.

(1) 8 F. 731.

(2) (1860) 30 L. J. (Ex.) 71.

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Midland Ry. Co. (1), where it was held that malice adds to the damage; and *Griffith* v. *Blake* (2), where the dictum of Jessel M.R. in *Smith* v. *Day* (3) was dissented from.]

Cripps, K.C., and *F. T. Cooper, K.C.* (with them *J. R. N. Macphail*) (the two last of the Scottish Bar), for the respondents. The damages assessed by the Lord Ordinary and the First Division are excessive. The evidence shewed no evil intent on the part of the respondents. They were members of the Edinburgh and Leith Corporation, and their entire interest was to safeguard the public supply of water. In fact, this particular litigation was commenced by the appellants threatening in November, 1896, to work out the minerals under the Crawley and Moorfoot pipes. The respondents had to meet that threat by obtaining an immediate interdict, for the whole supply of water to Edinburgh depended on the safety of these pipes. The fact that the interdict was unnecessarily wide in its terms was no proof of improper conduct or malice on the part of the respondents. If the appellants had bona fide desired to work the rich ground outside the interdicted area, they could at slight expense have diverted their levels or worked them from the other side; but they closed their works voluntarily, and not because of anything the respondents did. The claim of the appellants was really founded on the alleged malevolent feeling against the company. From none of the opinions in the Courts below can the respondents determine how the heavy damages for which they have been found liable have been assessed. The Lord Ordinary suggests nothing as a basis. His assessment of damage appears to be equivalent to 2500*l.* a month from the date of the interdict to September 18, 1897. And the 27,000*l.* awarded by the First Division appears to be arrived at by the Lord President taking the 15,000*l.* allowed by the Lord Ordinary and adding 2500*l.* per month for the longer period to which he held the interim interdict to last, namely, to February 3, 1898.

Even assuming that the appellants found it necessary to revert to the working at Broxburn, there would have been no difficulty in the appellants obtaining shale to keep their works going. In

(1) (1861) 30 L. J. (C.P.) 273, 281. (2) (1884) 27 Ch. D. 474.
(3) (1882) 21 Ch. D. 421.

that event the elements of damage appear to be the lessened profit or increased loss involved in working the Broxburn seam instead of the main seam under the pipes during the continuance of the interdict; secondly, the cost of keeping the main seam workings open by pumping during that period; and, thirdly, the expense of reverting to the Broxburn seam when the interdict was imposed and of returning to the main seam when it was removed. The cost of returning to the Broxburn seam would have been small, and a similar sum would have been ample to maintain the workings in Pentland until February, 1898, in proper condition for the appellants to resume operations. On these lines the respondents would, at the most, have been liable to compensation of a moderate amount—nothing approaching the 27,000*l.* awarded by the First Division. The ground for damages for a wrongous interdict was the connection of the damage with the interdict, and if the appellants could not prove that the interdict caused the damage they were not entitled to damages. Here there was no evidence that at the date of the interdict the appellants really intended to work the minerals under the pipes. All the companies which had worked these minerals in Straiton and Pentland prior to the appellants had in turn gone into liquidation. [They referred to *Smith* v. *Day*. (1)]

James Avon Clyde, K.C., in reply.

The House took time for consideration.

June 11. LORD LOREBURN L.C. My Lords, this case comes before your Lordships under conditions of exceptional difficulty. Both the Lord Ordinary and the First Division have found in favour of the pursuers. Nor is there any dispute in regard to liability. It is merely a question of damages. But the amount of damages, so far from admitting of precise calculation, depends upon a series of conjectures as to what would or might have happened in the way of working a shale mine if the defenders had not obtained a wrongous interdict to prevent or hinder its being worked. And the learned judges who heard this case in the Outer and the Inner House have not specifically found one

(1) 21 Ch. D. 421, 430.

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way or another upon a variety of issues of fact in regard to which a Court ought to be satisfied before it can assess damages with accuracy. No doubt these matters were duly weighed in the Courts below, but we have not their conclusions upon all of them, and this House can hardly review with any sense of confidence the great mass of detailed evidence without seeing and hearing the witnesses and judging for itself of their trustworthiness.

In substance the story of this dispute is as follows. Defenders, as the water authority for the city of Edinburgh, own two water-pipes which run over the surface of land beneath which are the pursuers' mines. If any subsidence should occur, these pipes would be injured, and the mines themselves might be flooded. Accordingly the pursuers wished the defenders to purchase, under the Waterworks Clauses Acts, a strip of the mines of forty yards in width on either side of the track upon which the water-pipes ran. Defenders refused to purchase. Upon this the pursuers, thinking that this refusal entitled them, under the Waterworks Clauses Acts, to work out their mines beneath the pipes and remove the pillars which had been left from previous workings, notified their intention of so doing. This was in the year 1897.

Now it so happened that both parties were at that time under a misapprehension of their legal rights. In law—though the point was not finally determined until it came before this House in 1903—the defenders were entitled to common law support for one of their two pipes. Therefore the pursuers had no right to work their mines so as to let down the surface, and their view that they had such a right was wholly erroneous. On the other hand, the defenders, though ignorant of their true title to support, erroneously thought that the pursuers were precluded from working within a space of forty yards on either side of a line vertically beneath the track of their water-pipes, because of their having already worked within that space before giving notices under the Waterworks Clauses Act. In this mistaken belief the defenders applied for and obtained in March, 1897, an interdict prohibiting pursuers from working their mines or removing shale within the said space of eighty yards. Now if the interdict had merely prohibited working so as to let down the surface it would have

been quite proper, for one of the pipes was in fact entitled to support. But instead of doing that, the interdict went further and forbade all removal of shale within the forbidden area. The reason of this blunder was that defenders misconceived their legal position, but the result of it is that they are liable in damages for whatever loss was sustained by pursuers in consequence of the interdict being in excess of what it ought to have been.

This interdict was granted in March, 1897. In September, 1897, the Lord Ordinary recalled it so far as the points now in issue were concerned. But the defenders appealed against this recall; and here, unfortunately, another error arose. It was held by the Lord Ordinary, erroneously as is now admitted, that the interdict did not continue operative until the appeal was heard in the Inner House. In Scottish law this interdict did in fact check the pursuers' mining operations from March, 1897, till February, 1898, when it was finally recalled by the Inner House.

When pursuers first brought their action they thought that the interdict was wrong from beginning to end, and claimed that they had suffered damages to the extent of 137,000*l.* by reason of being prevented from working the mines under the track of the pipes for the space of eighty yards in width. When they learned from the decision of this House in 1903 that the interdict was only in part wrong, they adapted their claim to the altered legal conditions, and said that the interdict wrongously prohibited them from driving levels through the eighty yards strip so as to get at and work shale lying outside of that strip. The claim for damages remained, as before, 137,000*l.* It is not disputed that the interdict did prohibit driving such levels and was to that extent wrongous, for such levels might have been driven without letting down the surface. And the real controversy in this case is practically narrowed down to the question what damages have pursuers suffered by reason of the interdict stopping them from driving such levels, and getting at the shale beyond, during the eleven months from March, 1897, to February, 1898.

I do not think any useful purpose would be served by a minute examination of the claim. It is based upon the theory that the pursuers had a prosperous future before them, and that they

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incurred ruin because of this interdict. I must say that the particulars of the claim seem to me most unsatisfactory; and the foundation on which it rests is highly speculative. I find it very difficult to believe that this company had any but the most remote prospects of success, and it seems at least doubtful whether it was to any considerable extent affected by so much of the interdict of March, 1897, as was wrongous. There is a great deal to be said for the view that the company would in no case have succeeded and that the grievance of not being able to drive levels is a mere afterthought, conjured up to sustain a claim of damages when the original claim had broken down. But I do not feel myself at liberty to depart, on such points, from the opinion of the learned judge who saw and heard the witnesses, and, though he does not in detail deal with the evidence which has awakened my misgivings, he does find that a wrong was done and that substantial damage has ensued. Your Lordships, as it seems to me, are in this case practically bound to accept that conclusion.

In assessing the damages Lord Pearson arrived at the figure of 15,000*l.*, upon the footing, which is not now sustained, that the interdict was operative only till September of 1897. No materials are given that enable me to discover how this figure was arrived at. The First Division found that the interdict was operative till February, 1898, and fixed the damages at 27,000*l.* So far as can be surmised—for here again materials are wanting for a definite opinion—the First Division adopted Lord Pearson's basis and merely gave an additional sum for the additional months during which the interdict continued in force. Where everything, or nearly everything, rests in conjecture, there is room for infinite diversity of view.

This is like the common case where a jury are asked to assess damages with no fixed rule and few ascertained facts to guide them. In such cases very strong ground must be laid for disturbing the verdict. I think your Lordships can only apply the same principle here. I have not been satisfied that the sum of 27,000*l.* does not fairly represent the damages.

For these reasons I am of opinion that both the appeal and the cross-appeal should be dismissed with costs.

I may inform your Lordships that my noble and learned friend Lord Macnaghten has asked me to say that he concurs in this opinion.

LORD ASHBOURNE. My Lords, I concur with the Lord Chancellor.

Yet, although the liability of the defenders is clear and the question, in my opinion, resolves itself into the consideration of the amount of the damages to be awarded, the case is one of much difficulty, and it is far from easy to make anything like a precise calculation of the sum to be assessed as damages.

The amount asked for by the pursuers is the large sum of 137,000*l.*, and Lord Pearson has awarded the substantial sum of 15,000*l.*, which the First Division has increased to 27,000*l.* We have no means of knowing how these figures were worked out, but, once the First Division decided that the interdict continued until the final disposal of the case in February, 1898, instead of terminating, as the Lord Ordinary thought, in September, 1897, it was obvious that the damages must be largely increased. It is not easy to see why the Lord Ordinary fixed the sum of 15,000*l.* as being the appropriate figure, or why the First Division considered 12,000*l.* as being the proper increase. Possibly, accepting the 15,000*l.*, which was fixed by Lord Pearson after seeing the witnesses, as being reasonably sufficient to satisfy the damage sustained during the period in which he considered the injunction was in operation, the First Division thought 12,000*l.* would about represent the addition which should be made for the period between September, 1897, and February, 1898.

There is great scope for speculation and uncertainty as to figures, but I see no reason why the decision of the First Division should be dissented from. In my opinion the judgment of the Lord Chancellor is correct.

LORD JAMES OF HEREFORD. My Lords, I concur in the judgment of the Lord Chancellor.

LORD ROBERTSON. My Lords, I agree that the appeal should be dismissed.

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LORD COLLINS. My Lords, it seems to me that the question on this appeal resolves itself into one of fact, upon which we are invited to differ, not only with the judge of first instance, who heard and saw the witnesses, but also with the Lord President and the First Division judges, who elaborately reviewed his decision. It would be very difficult for this House, upon an examination of the materials before them, to differ upon a question of fact unless it were made to appear that some wrong principle of law had been brought to bear on the facts. And the appellants have accordingly sought to point out one or more misconceptions on the part of their Lordships in dealing with the facts.

Now it seems to me impossible to contend that the interdict of March 16, 1897, was not wrongous, in that it put too rigorous a restraint upon the working of their mine by the appellants. In fact, the defenders hardly contended the contrary before us in view of the consensus of opinion below upon this point. But they urged one main contention with respect to it, viz., that by reason of the independent obligation on the company to safeguard the Crawley pipe the interdict placed no larger limitation upon their working than that which already bound them in respect of the Crawley pipe. This is a question of fact, and lies at the bottom of the appeal, since there could be no claim for damages in respect of interdiction from doing that which they were not free to do if there had been no interdict. I am of opinion that this point has been completely and satisfactorily disposed of in the judgments of the Lord Ordinary and the Lord President, and that accordingly the pursuers sustained not merely nominal, but substantial, damages by reason of the interdict.

The next point urged by the respondents in their case was that the interdict must be taken to have ceased to be effective after September 18, 1897, when the Lord Ordinary repelled the interdict as to the shale, leaving that as to the limestone perpetual; and this was the view taken by the Lord Ordinary himself. The point turns upon a nice question of Scotch practice, on which the opinion of the seven judges was taken, and is elaborately dealt with by the Lord President in the First Division, holding that the interdict continued effective until the final disposal of

the case in February, 1898. The respondents abandoned this point at the hearing.

The appellants therefore, it seems to me, have established their right to claim substantial damages, treating the interdict as continuing in operation down to the later date. But have they succeeded in shewing that, having so far made good the position accorded them by the Court below, they are entitled to still further damages? They have not, as it seems to me, succeeded in pointing out any reasons which would justify us in interfering with the conclusions of fact arrived at below on questions of mining practice and business management, nor, indeed, have we the materials before us which would enable us to review these findings were we otherwise competent to do so. But they do take one point which they contend shews that a wrong measure of damages was applied, and that in consequence the amount awarded was improperly reduced. For this point they found mainly on a passage in Lord Dunedin's judgment: "The defenders are not to be prejudiced by the fact that the times were bad and that the company was not rich. Accordingly a claim upon total loss is, I think, inadmissible." It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for in my opinion the wrong-doer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrong-doer, who has got to be answerable for the consequences flowing from his tortious act. On the other hand, the victim being in fact a poor man is not entitled to claim damages in respect of lost opportunities which he could not have utilized unless he had been rich. A company whose financial position was such that it could not have availed itself of the opportunity of placing its goods in substantial quantities on a rising market cannot claim damages on the footing that it

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might have done so. If the pecuniary disability were traceable to the wrong-doer the case would, of course, be different. But I think the words in their context do not imply more than I have stated, and I think this is made clearer by comparing a passage in the judgment of the Lord Ordinary which was probably in Lord Dunedin's mind in the passage referred to. The passage in Lord Pearson's judgment is on p. 885 of the record, where he says: "The evidence leaves in considerable doubt whether they would have been able, if all had gone on uninterruptedly, to take advantage of the rise in prices, and to hold their own with other companies." This seems to me a perfectly legitimate consideration. They cannot claim to be placed in a better position by reason of the wrong than they would have been in had it never been committed.

Another point in the judgment of Lord Dunedin is, I think, open to criticism, viz., that the pursuers might have reverted to the Broxburn seam and cannot rely upon the contention that they were advised by their expert not to do so. I think the wrong-doer is not entitled to criticize the course honestly taken by the injured person on the advice of his experts, even though it should appear by the light of after-events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong. However, I feel that it is impossible, on the material before us, to measure approximately what sum has been deducted in the calculation on this point from what otherwise might have been allowed, and I am not prepared to say that the sum awarded to the company is not on the whole enough.

One other point ought to be noticed. The appellants pressed upon us the view that the trustees had acted maliciously in procuring the interdict—that is to say, that their object had been not so much to protect their pipes as to force the appellants into bankruptcy. I agree with Lord Dunedin that there is evidence in support of this view, but I am at a loss to see what bearing it has on the actual facts of this case. It is not essential to the cause of action, which rests on the grant of the interdict on caution, and therefore I think it is not a case for exemplary or punitive as distinguished from compensatory

damages. Nor, as it seems to me, can it have any effect upon the measure of damages in the events that have happened. The defenders do not, as I understand them, dispute that if what Lord Dunedin described as "total loss," or what Mr. Clyde called "bleeding to death," were legally traceable to the wrong done by the defenders, they would be liable to pay damages measured by that standard, and the introduction of malice could not possibly entitle them to more. In the result I agree with the conclusions of the First Division, and am of opinion that the appeal and the cross-appeal must be dismissed.

LORD LOREBURN L.C. My noble and learned friend Lord Atkinson also desires me to say that he concurs in the opinion which I have expressed.

Ordered, that the appeal and cross-appeal be dismissed with costs.

Lords' Journals, June 11, 1907.

Agent for appellants: *John Kennedy, W.S., for Drummond & Reid, W.S., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Millar, Robson & M'Lean, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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KILLERY'S DIVORCE BILL.

Second Reading.

Divorce—Irish Divorce Bill—Access to Children—Practice.

The House of Lords will approve of a clause in a divorce Bill giving the custody of the children of the marriage to the innocent party, but will refuse to order that a provision shall be inserted in the clause giving the guilty party access to the children. Any such provision must be left for arrangement between the parties.

Bill to dissolve the marriage of the petitioner, Mrs. Gwenllian Pascoe Killery, with the respondent, Captain St. John Brown Killery, of the R.A.M.C., on the ground of his cruelty and adultery. The parties were married on March 18, 1899, at the Roman Catholic Church, Rangoon, and they lived together till 1906, when the petitioner found it necessary, owing to his cruelty, to leave her husband. It was then discovered that he had been guilty of adultery. There was one child (a son), born in June, 1900, of the marriage. The respondent was a domiciled Irishman. On April 16, 1907, the judge of the King's Bench Division (Matrimonial) of the High Court of Justice in Ireland found the respondent guilty of adultery and cruelty, and made a decree of divorce from bed and board. Captain Killery being stationed in Burma, substituted service of the Bill, and order for second reading was granted on June 12; his solicitors in London having been, by cablegram, empowered to accept service.

The petitioner and several witnesses were examined and proved adultery and cruelty on the part of the respondent, and there was practically no opposition except on clause 6 of the Bill, which was (inter alia) as follows:—

"6. In order to secure as far as circumstances will admit the virtuous education of the said Valentine St. John Killery the child of the said St. John Brown Killery and Gwenllian Pascoe Killery be it enacted that it shall not be lawful for the said St. John Brown Killery to remove his said son from the care and

custody of the said Gwenllian Pascoe Killery during the minority of the said Valentine St. John Killery."

The clause also contained a provision that the respondent should pay 150*l.* a year for the maintenance of the child, but this part of the clause the petitioner's counsel withdrew at the bar.

Eldon Bankes, K.C., and *J. W. Greig*, for the petitioner. Mrs. Killery is entitled to the custody of the child, but is willing to give the respondent reasonable access; but who is to decide what is reasonable access? A provision for access could not be put into the Bill. It would be better to leave the matter for arrangement between the parties.

Lynden Macassey, for the respondent. Captain Killery desires to have reasonable access on giving notice; a provision to this effect ought to be added to clause 6. If the first part of the clause stands, then Mrs. Killery might refuse all access; the respondent would be content if the clause left it to any named Court or tribunal to arrange for the respondent seeing his child. [He referred to *Hart's Divorce Bill* (1) as the only precedent.]

[EARL OF HALSBURY. Their Lordships are of opinion that, as the petitioner's counsel has suggested, the better course would be to leave the matter of access for reasonable arrangement between the parties. We do not feel that we could appropriately put into an Act of Parliament what has been suggested. The parties themselves must arrange for access to the child here.]

THE HOUSE (Earl of Halsbury and Lords James of Hereford, Robertson, Atkinson, and Collins) read the Bill a second time.

Lords' Journals, June 20, 1907.

Agents for petitioner: *Lewis & Lewis.*
Agents for respondent: *Field, Roscoe & Co.*

(1) [1898] A. C. 305.

[PRIVY COUNCIL.]

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MUNICIPAL COUNCIL OF SYDNEY . . . PLAINTIFFS;

AND

TERRY . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Sydney Corporation Act of 1879—*Moore Street Improvement Act*, 1890—*Construction—Owners for the Time being liable for the Rates.*

The Sydney Corporation Act of 1879 authorized the municipal council to impose rates, called a city rate, on all rateable property within the city, to be paid by the occupier, or in his default by the owner thereof for the time being.

The Moore Street Improvement Act of 1890 was passed to carry out certain improvements of Moore Street on "an equitable system," and provided that the cost thereof should be divided between the whole body of ratepayers liable to the city rate and those who were owners of property within the improvement area:—

Held, overruling the Court below, that, according to the true construction of the later Act, owners of property within the improvement area meant owners for the time being. The intention was to create a charge on their property, and not a mere personal charge on the persons who happened to be owners thereof at the date of assessment.

APPEAL by special leave from a judgment of the Supreme Court (March 2, 1906) entered for the defendant in an action brought by the appellants.

The appellants claimed from the respondent 130*l.* 11*s.* 8*d.* alleged to be payable by him under the provisions of the Moore Street Improvement Act, 1890 (Statutes of New South Wales, 54 Vict., No. 30), for annual instalments of a contribution towards the cost of widening or otherwise improving Moore Street, in the city of Sydney.

The judgment was entered on a special case stated by consent of parties and sufficiently referred to in the judgment of their Lordships. The reasons given by the Court were only that

* *Present:* LORD ASHBOURNE, LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

the case was governed by a previous decision of *Wrench* v. *Richardson*. (1)

Sir R. Finlay, K.C., and *Vaughan Hawkins*, for the appellants, contended that the decision of the case cited depended only on the construction of a covenant in a lease, and was immaterial and erroneous. By the true construction of the Improvement Act (see ss. 4, 5, 6, 7, 25 and 26), and having regard to the Corporation Act, 1879 (see ss. 103, 112, 114, 115, 118 and 238), the persons liable to pay the instalments of contribution from owners of property within the improvement area are or include the persons who are owners of the property at the time when the rates or instalments become payable. The language of the Act does not support the view that the liability is confined to the owners at the time when the assessment was made and their representatives. The view is, moreover, an unreasonable one, inasmuch as the owner at the time of assessment might be a trustee or a limited owner, and the instalments must extend over a period from fifty to a hundred years. The effect of adopting that view is, in case the owners cannot be found or cannot pay, to throw upon the ratepayers a portion of the burden which it was intended that the owners should bear, or which should be borne by the property which they own. At the present moment eleven of the assessed properties, representing a fifth of the total assessment, are in the hands of those who were not owners at the date of assessment, and the number will increase as time goes on. Reference was made to *Payne* v. *Esdaile*. (2)

C. A. Russell, K.C., and *P. Rose-Innes*, for the respondent, contended that on its true construction the Improvement Act in question imposed a personal liability upon the owners of property within the improvement area at the time of assessment. Such owners became liable to the whole assessment, with power to discharge the same, as provided by s. 4, that is, by instalments spread over a period not less than fifty nor more than a hundred years. The Act did not impose any charge on the land, nor any personal liability on persons becoming owners by purchase or otherwise than by inheritance of land within the improvement

(1) (1898) 19 N. S. W. L. R. 78. (2) (1888) 13 App. Cas. 613, 623.

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area after the date of assessment. It was further contended that s. 26 of the Improvement Act, if it incorporates s. 115 of the Corporation Act, created no new liability such as is claimed against the respondent. The intention was simply to provide a remedy against the owner originally assessed, not to create a liability on the part of persons in the position of the respondent. The Improvement Act does not provide for recording changes of ownership during the period for instalments. It was contended that if successive owners were liable the Act would have provided a machinery for recording their names and enforcing their liability.

Counsel were not heard in reply.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The action which has given rise to this appeal was brought by the municipal council of Sydney against the respondent Edward Terry to enforce payment of 130*l.* 11*s.* 8*d.* The sum in question is the aggregate amount of four yearly instalments (including three years' arrears) of a contribution towards the cost of a local improvement in the city of Sydney assessed upon the respondent's predecessor in title, the Sydney Real Estate Bank, Limited, as owner of certain premises within the improvement area. The sum which the bank was required to pay as its "share of aggregate amount of contribution" towards the cost of the improvement was 800*l.* The amount was to be paid off by annual payments of 32*l.* 12*s.* 11*d.*, extending over a period of a hundred years from January 1, 1892. The Sydney Real Estate Bank, Limited, has now ceased to exist. Its property has been sold. The present claim is made against the respondent as owner in possession of the premises at the time when each of the four several instalments fell due.

On a special case stated by consent the Full Court of New South Wales, holding itself bound by a previous decision, gave judgment in favour of the respondent and dismissed the action with costs. From that judgment the present appeal has been brought by special leave.

The question involves the construction of the special Act under which the improvement was carried out. It turns upon the

meaning of the expression "owners of property within the said improvement area." The appellants maintain that the word "owners" as used in the Act means and includes owners for the time being of the property in respect of which the contribution was assessed. The respondent, on the other hand, contends that, according to the true construction of the Act, liability is confined to the persons who were such owners at the time when the assessment was made, and that no charge was imposed upon the property itself, or attached to the ownership of the property.

The municipal council of Sydney was constituted by the Sydney Corporation Act of 1879, and authorized to impose rates, which are collectively known as "the city rate," on all rateable property within the city. There were the usual provisions for assessing property, making up rate books, notifying persons liable, and enforcing payment of rates. In the case of occupied property the rate was to be paid by the tenant of the premises in respect of which the rate was payable, or in case of his default by the owner of such premises. In the case of vacant premises the rate was to be paid "by such person, who at the time . . . . at which such rate is made payable is the owner of such premises." The term "owner" is defined in the Act as "The landlord or person at the time receiving the rent for any premises whether on his own account or otherwise, or who shall claim to be the owner."

Sect. 118 declares that in case any person liable to pay any rate neglects or refuses to pay the amount thereof for fourteen days after a notice in the prescribed form has been "left at the premises liable for such rate," or after he shall by any such notice have been required to pay such rate, a warrant of distress may be issued. Sect. 238 further declares that, in addition to other means of enforcing payment of any sum due in respect of any rate, the council may recover any such sum not exceeding three years' arrears by action or suit against the person liable.

It may be observed that the Act of 1879 contains a provision empowering the council to carry out local improvements, but the provision is clumsy and imperfect and subject to conditions which apparently deprive it of all practical value. The whole cost was to be thrown indiscriminately upon the ratepayers

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within the improvement area, and defrayed by a special rate made and levied "equally on all rateable property situated within such locality." The first step was a petition signed by not less than two-thirds of the ratepayers in the locality praying that the special rate required might be levied. In the present case a special Act, called "the Moore Street Improvement Act of 1890," was obtained in order to carry out the improvement of Moore Street upon a system described in the title of the Act as "an equitable system." The cost was to be divided between the whole body of ratepayers liable to the city rate, upon whom a rate was to be levied called the special street improvement rate, and those ratepayers who were owners of property within the improvement area.

By the Act of 1890 the council, before commencing to carry out the improvement, was directed to publish in manner therein prescribed a notification setting forth the nature of the improvement and stating that a plan, shewing the extent and position of the improvement area within which the owners of property liable to the city rate would be contributors to the special improvement rate, together with a list of the names of such owners so far as the same could be ascertained, had been deposited with the town clerk for inspection by any person interested. The notification was to give a detailed estimate of the cost of the improvement, the amounts of, and dates of making, the repayments necessary to defray the whole cost thereof, with interest at a rate not exceeding 4*l.* per cent. per annum. The period (not to exceed a hundred years, and not to be less than fifty years in any case) over which such repayments would be spread and the respective proportions (subject to appeal) in which the owners of property within the improvement area and the special street improvement rate were to defray such cost were also to be specified in the notification. It was provided by the Act that the proportion in which the owners of property within the improvement area should (subject to appeal) contribute to the cost of the improvement should not in any case be determined by the council at less than one-half of such cost and interest. The balance was to be a charge upon and be paid out of the special street improvement rate. The Supreme Court on appeal

was, however, empowered to vary within certain limits the proportions prescribed by the Act.

Sect. 6 provided that within thirty days after the publication of the aforesaid notification the council should cause to be made and deposited with the town clerk an assessment book in which should be specified the amount which every owner of property situate within the said improvement area would be required to pay "in respect of his property" as his share of the aggregate amount of the contributions of all such owners. In determining such share regard was to be had by the council to the position of every such property and the degree of permanent enhancement in its capital or annual value which the improvement might reasonably be expected to produce.

Then follow provisions for publishing notice of the assessments, provisions for appeal by an owner aggrieved at his assessment, power for the council to resume lands for the purpose of the improvement, power for the council to borrow on debentures and power to impose and levy on all property rateable under the Act of 1879 within the city of Sydney a street improvement rate subject to a limitation in amount, and a declaration that every such rate should in all other respects be made, assessed, imposed, levied and enforced under and pursuant to the provisions contained in the Act of 1879 relating to the city rate.

Sect. 26 provides that all powers and provisions for enforcing the payment of rates and other sums of money due to the council contained in the Act of 1879, or in any other Act relating to the corporation, should be applicable and might be exercised and carried out by the council and all other persons for the purpose of enforcing payment of any sum payable by way of contribution from any owner of property within an improvement area under the Moore Street Improvement Act.

The question at issue seems to their Lordships to be free from all difficulty.

It will be observed that, at the time when the Moore Street improvement was taken in hand, there was a complete system of rating established in the city. The Act of 1879 contained provisions for executing street improvements, although those

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provisions appear to have been unworkable. The special Act for the Moore Street improvement took the place of those provisions and proceeded on a more equitable system. Instead of throwing the whole cost on the premises within the improvement area it divided the cost between the owners of premises within that area and a general rate on the city at large. But the special Act is founded and engrafted upon the general Act of 1879. It is almost inconceivable that the framers of the special Act should have departed so widely from the principles of the Act of 1879 as to throw part of the cost of the improvement on rateable property within the city, and part as a mere personal charge on the persons who happened to be owners of property within the improvement area at the time when the assessment was made, especially when it is borne in mind that the contributions of owners within the improvement area were to be spread over a period which might be a hundred years, and in no case was to be less than fifty years, and that some at least of the owners might be limited companies, or trustees, or persons with merely a life interest. The only semblance of argument on the part of the respondent was founded on the circumstance that the special Act contains no provisions for recording changes of ownership during the period over which the contribution was to extend. But, in reality, the absence of such a provision affords an argument against the respondent's contention. It was right and proper that special notice should be given to the owners of property within the improvement area at the time when the assessment was made, and that every possible means should be taken to make an accurate record of those persons, with a view to the protection of their property, and in order to ensure a fair assessment. For the protection of the municipality nothing more was required. Everything else would be supplied by the city rate books if the contribution was to be levied in the same manner as the city rates. And that is the very thing which is provided for by the last section (s. 26) of the special Act. Taking that section into consideration as well as the language of s. 6, which speaks of the contribution from an owner of property within the improvement area as a contribution which "he will be required to pay in respect of his property," and so describes it

as a charge upon the property, it seems to their Lordships to be quite clear what the intention of the special Act was. There is nothing in the Act from first to last tending to support the extravagant contention advanced on the part of the respondent.

Their Lordships, therefore, will humbly advise His Majesty that the appeal ought to be allowed, the order of the Full Court discharged, and judgment entered up for the plaintiffs for the sum of 130*l.* 11*s.* 8*d.*, together with the costs of the suit.

As to the costs of the appeal, having regard to the terms of the submission on which special leave to appeal was granted, their Lordships think they ought to be paid as between party and party by the appellants.

Solicitors for appellants: *Light & Fulton.*
Solicitors for respondent: *Valpy, Peckham & Chaplin.*

[PRIVY COUNCIL.]

CORPORATION OF THE CITY OF TORONTO PLAINTIFFS;

AND

TORONTO RAILWAY COMPANY . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

J. C.* 1907 *March* 8; *April* 26.

TORONTO RAILWAY COMPANY . . . . . DEFENDANTS;

AND

CORPORATION OF THE CITY OF TORONTO PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ontario Act 55 Vict. c. 99—Sale and Purchase of Street Railway System—Exclusive Power of Purchasers to operate—Construction.

By agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Company dated September 1, 1891, and confirmed by Ontario Act 55 Vict. c. 99, the latter acquired, not merely the material of the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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city of Toronto" in the fullest possible way within the period of the agreement:—

Held, that, on its true construction, territorial additions to the city made during the term of the agreement were not within its scope.

By clause 14 it was provided that the company might be required to lay down new lines or extend tracks and car service as approved by the city, and by clause 17 it was provided that on the company failing so to do the privilege so abandoned might be granted to any other person or company without any resulting claim to the purchaser for compensation.

Held, that under these clauses, construed so as not to derogate from the exclusive right of the company, the sole remedy in case of non-compliance was that provided by the latter clause, and that a claim for damages was not maintainable.

Held, also, that the exclusive power to operate included the right to determine the route and stopping of the different cars and their inter-relations, which was not displaced by other provisions. In particular, clause 26 gave the city power to determine the speed and service necessary on each main line. But it was included amongst sections headed "track, &c., and roadways," all referring to the physical condition of those entities, and not to the course or direction of the cars, and should not be construed as intended to derogate from the company's exclusive powers.

APPEAL, by special leave, in a special case from a judgment of the Supreme Court (May 1, 1906), modifying a judgment of the Court of Appeal for Ontario (November 13, 1905), which sustained the claims of the appellants.

The appellants became prior to September 1, 1891, the owners of the street railway in suit, and the respondents on that date by contract (which was for twenty years, renewable for ten more) scheduled to their incorporating Act (Ontario, 55 Vict. c. 99) became entitled to and have since operated the railway. In 1903 the appellants brought their action, in which by agreement a special case was stated, submitting questions of law arising upon the construction of the said contract and its annexed conditions, the terms of which are sufficiently stated in their Lordships' judgment. So far as material to the appeal those questions were:—

"Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon and direct—

"(1.) What new lines shall be established and laid down and tracks and service extended thereon by the company, whether on

streets in the city as existing at the date of the agreement or as afterwards extended."

"(2.) What time-tables and routes shall be adopted and observed by the company?"

"(6.) Is the privilege to grant to another person or company for failure of the company to establish and lay down new lines and open same for traffic, or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy that the city can claim?"

During the action the city of Toronto annexed a new area and passed a by-law under clause 14 of the conditions to compel the respondents to lay down its tracks across the old city limits to a point in the new territory, and again sued in 1905 for specific performance of their agreement in that respect.

The Supreme Court held, on the special case, "that neither the city nor the company have any street railway powers under the said agreement over streets within new territorial additions to the city during the term therein mentioned"; and in June, 1906, the Court of Appeal for Ontario in the suit for specific performance followed that ruling and held that the company was not bound to comply with the said by-law. In other respects the judgment of the Supreme Court was favourable to the corporation, for it decided that—"It is for the city, and not for the railway company, to determine, decide upon and direct, and in the manner prescribed by clause 14 of the conditions of the agreement of September 1, 1891, what new lines shall be established and laid down, and tracks and services extended thereon by the company on streets in the city as existing at the date of the agreement."

"It is for the city engineer, with the approval of the city council, to determine, decide upon and direct, what time-tables and routes should be adopted and observed by the company."

The 6th question, stated above, was answered in the negative, the Chief Justice dissenting, in these terms:—

The Court is of opinion that the privilege to the plaintiffs to grant to another person or company for failure of the defendants to establish and lay down new lines and to open the same for traffic, or to extend the tracks and service upon any street or

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streets as provided by the agreement, is not the only remedy which the plaintiffs can claim, and doth declare, order and adjudge the same accordingly.

The city obtained special leave to appeal from that part of the judgment which excluded the new territorial additions from the scope of the agreement, and the company obtained special leave to raise objections, without cross-appeal, to the said judgment on any question of substantial importance raised by the special case. They accordingly objected to the answers given to the three questions above stated.

Hellmuth, K.C., *Rowlatt*, and *W. Johnston*, for the appellants, contended that on the question raised in the main appeal the answer of the Supreme Court should be reversed and that of the Court of Appeal restored, which gave to the city the power to decide under clause 14 what new lines should be laid down within territorial additions to the city. They contended that the words "city of Toronto" used in the conditions, agreement, and Act included such territorial additions as might be made during the term of the agreement. That was the intention of the parties and the legislation provided for dealing with railway lines constructed by the respondents within such additions. They referred to *Toronto Ry. Co.* v. *Toronto Corporation* (1) as deciding in favour of their contention. That case affirmed a decision of the Court of Appeal. (2)

Sir R. Finlay, K.C., *Nesbitt, K.C.*, and *McCarthy*, for the respondents and cross-appellants, contended, on the question raised by the appellants, that the Supreme Court was right. The agreement and the Act only deal with property within the city limits existing at the time. It was ultra vires for the city to give exclusive rights outside its own limits, and neither party contemplated such provision. With regard to the first question raised in cross-appeal, they contended that the company had the right to select the streets within the then existing city on which to establish new lines. The exclusive right to operate a street railway was the subject of the transaction. Sect. 4 of 55 Vict. c. 99 defined that right. The only restrictions upon that right

(1) [1906] A. C. 117, 119 et seq. (2) (1904) 5 Ont. W. R. 132.

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are those contained in the conditions of sale, under the heading "tracks, &c., and roadways," which do not purport to cut down the right in any way, but only to control the manner in which it is to be exercised. There is no provision which gives the city the right to select instead of the company, except clause 14, which must be read with clause 17. So read it created no right capable of enforcement against the respondents, but merely permits an alternative course to the city in case the respondents decline to exercise the rights vested in them. So also with regard to the second question, the construction of the agreement must be dominated by the plain object and intention, which were to give to the respondents the exclusive right to operate. Any construction which would deprive them of the essence of the thing bought and sold should be avoided, unless the words used compelled its adoption. They cited *Toronto Corporation* v. *Bell Telephone Co.*(1); *Montreal Street Ry. Co.* v. *Montreal City.* (2)

Hellmuth, K.C., replied.

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The judgment of their Lordships was delivered by

LORD COLLINS. The questions in these appeals turn upon the construction of the agreement, confirmed by statute, regulating the rights of the appellants and respondents respectively in regard to the working of a certain street railway in the city of Toronto. Prior to September 1, 1891, the principal appellants, hereinafter called "the corporation," had become the owners of the said railway, which they proposed to sell and offered for sale by tender subject to conditions prepared by their engineer. The tender of one George Kiely and others was accepted, for whom the respondents in the principal appeal, hereinafter called "the railway company," were substituted on the terms of an agreement which was confirmed by statute 55 Vict. c. 99. The railway company thenceforth have continued to work the railway. Disputes having arisen between the parties as to their rights in relation to the said railway, the corporation in 1903 commenced proceedings to have them determined. These proceedings were ultimately carried to the Supreme Court of Canada, from whose judgment the first of these appeals now

(1) [1905] A. C. 52. (2) [1906] A. C. 100, 102.

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comes before their Lordships. The main appeal is by the corporation upon one point, pursuant to special leave thereto enabling them. The railway company by the like leave raise several points by way of objections to the said judgment in lieu of a formal cross-appeal.

The second appeal, in which the railway company are the appellants, is from the Court of Appeal for Ontario, and arises out of proceedings commenced by the corporation in 1905 to enforce certain clauses of the above-mentioned agreement.

The question on the main appeal is: Has the corporation street railway powers under the agreement over streets within new territorial additions to the city during the term therein mentioned?

The Supreme Court, overruling in this respect the decision of the Courts below, has decided by a majority of three to one that it has not. The reasons given in the judgments of Sedgewick and Idington JJ., with whom Davies J. concurred, seem to their Lordships so full and satisfactory as to make it unnecessary to say more than that they adopt and agree with them. The injustice involved in the contrary view, which would enable the corporation to compel the railway company to extend their lines at an indefinite expense, and for indefinite distances, where the maximum fare chargeable for any distance is 5 cents, seems to their Lordships insuperable. Their Lordships are of opinion, therefore, that on this point the corporation fails.

The objections raised by the railway company seem to be in substance two—

(1.) Where under condition 14 the railway company has been required to lay down new lines or extend tracks and car service as recommended by the engineer and approved by the city council according to the terms of the condition, can the railway company, having regard to condition 17, be compelled to carry out such requirement or pay damages if they do not?

(2.) Can the corporation insist upon the railway company following such routes and stopping at such places as are determined by the civil engineer and approved by the city council?

The question of stopping is also the subject of the railway company's appeal from the Court of Appeal for Ontario.

The Supreme Court (Sedgewick J. dissenting) have answered these questions in favour of the corporation against the railway company.

With respect to the first of these two questions there can be no doubt that by the bargain between the parties the railway company were to acquire, not merely the material of the railway undertaking, but the exclusive right "to operate surface street railways in the city of Toronto." That is "the privilege" to be disposed of by the 1st condition of sale.

By the preamble of the statute the Act is said to be "to the intent and purpose that the company may carry out the agreement with the city of Toronto for the purchase of the street railways and properties and the street railway privilege of and belonging to the city of Toronto, and may work the said railways."

By clause 1 it is declared that under the agreement the purchasers are entitled to the exclusive right and privilege of using and *working* the street railways in and upon the streets of the city of Toronto with certain exceptions. And by clause 4 the company shall, subject to the provisions and conditions of the agreement, "have full and exclusive power to acquire, construct, complete, maintain, and *operate* . . . . a double or single track street railway with the necessary side tracks, &c. . . . . upon or along all or any of the said streets or highways of the city of Toronto, subject to the exceptions and under the qualifications contained in the 1st section hereof, and to take, transport, and carry passengers upon the same . . . . and to construct and maintain . . . . all necessary and convenient works . . . . required for the *due and efficient working thereof* . . . . and shall have full power to carry out, fulfil, and execute the said agreement and conditions."

By s. 19 the company is empowered, with the consent of the local corporations in the county of York, to acquire privileges to build *and operate* surface railways within the limits of such municipalities, with the proviso that, if such local municipalities should be annexed to the city of Toronto within the period of the main agreement, the company shall have all the rights and be subject to the conditions of the main agreement, and

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shall be discharged from all agreements and conditions with the local municipalities.

By clause 11 of the agreement scheduled to the Act the right granted is "the exclusive right . . . . upon the aforesaid conditions *to operate* surface street railways in the city of Toronto."

By clause 15 the company are to pay to the corporation $800 per annum per mile of single track or $1600 per mile of double track occupied by the rails within the said limits. They are also, by clause 16, bound to pay monthly percentages varying from 8 to 20 per cent. according to the amounts thereof upon the gross receipts. It would seem, therefore, to be perfectly clear that it was intended to confer upon the company in the fullest possible way the power of "operating" the street railway system. It was obviously fair that this should be so, as the difference between profit and loss would probably depend mainly on the skill brought to bear on the operating, and the company had the exclusive interest in the net profits, the corporation getting their percentages from the gross receipts. It is into a bargain whose main features are what has been described that the series of provisions out of which the questions now under discussion arise are introduced, and the true effect of these provisions can only be reached by looking at them in reference to the whole bargain. Coming then to the two clauses most material to the first question under discussion, viz., the 14th and the 17th clauses, it would seem that they ought to be construed so as to harmonize as far as possible with the general provisions of the bargain.

They run as follows:—Clause 14: "The purchaser will be required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council, within such period as may be fixed by by-law to be passed by a vote of two-thirds of all the members of the said council, and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, and the right to operate the same shall terminate at the expiration of the term of this contract."

Clause 17: "In case the purchaser fails to establish and lay down any new line, as aforesaid, and to open the same for traffic, or to extend the tracks and services on any street or streets within such period as may be fixed by by-laws of the city council, to be passed as herein provided, the privilege of laying down such new lines or extensions on the street or portion of street so abandoned by the purchaser may be granted by the said council to any other person or company, and the purchaser shall in such case have no claim against the city for compensation."

The 14th clause appears on its face to derogate from the exclusive rights conferred on the company in the clauses already cited to operate the railway along all or any of the streets or highways of the city of Toronto. The exclusive right in terms negatives the participation of any other person or persons in that right, while the word "operate" in its context seems to embrace the working of the street railway as a system, and to carry with it the right to include or exclude certain streets in or from such system. To hold that the 14th clause enables the corporation to compel the company to incur the expense of making a railway in streets where in the view of the latter it cannot be worked at a profit or beneficially introduced into their system would be to adopt an interpretation so much out of harmony with the unambiguous provisions of other clauses that their Lordships ought not to do so unless the wording is so plain as to leave no alternative. But it seems to their Lordships that, as pointed out by Sedgewick J., mitigation of the apparent hardship is to be found in clause 17, which deals with the consequences which are to follow on the failure by the company to lay down the new line according to the requirements of the corporation, viz., that the privilege, which the clause treats as thereby abandoned by the company, of laying down new lines or extensions in such streets, may be granted by the council to any other person or company, and the company deprived of any claim against the city for compensation in consequence. This interpretation, which is that which commended itself to Sedgewick J., seems to their Lordships to be quite open on the language of the clauses, and, by treating the remedy thus provided by the statute as displacing every other, avoids the hardship and inconsistency of the view adopted by the majority.

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The argument so much relied on in the Court below, that by clause 12 of the agreement the company had covenanted to perform the 14th condition, is thus displaced.

Next, with regard to the last question, which involves what has been called in the argument the "routeing" of the cars and the places of stoppage.

As has been already shewn from the passages cited, the exclusive right of "operating" the street railways has been in the most explicit terms conferred upon the company. Now, whatever else the word "operating" may include, it seems to their Lordships most certainly to embrace the right to determine the routes of the different cars and their inter-relations. This seems to lie at the root of successful management of the enterprise, and ought to be in the hands of those who are responsible for getting the best monetary return out of it. How far, then, has this exclusive discretion, which would seem prima facie at all events to be conferred on the company, been displaced by other provisions in the bargain?

The clause mainly, if not exclusively, relied on for the corporation was the 26th of the conditions of sale: "The speed and service necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council."

This clause is the last of a fasciculus, of which the heading is "Track, &c., and Railways," and, as was held in *Hammersmith Ry. Co.* v. *Brand* (1), such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation. On looking through the clauses down to the 26th, it is clear that "tracks, &c., and roadways" refer to the physical condition of these entities, and not to the course or direction of the cars, which is the governing idea in the word "routes." The words of clause 26, therefore, prima facie are not addressed to the routes at all, in the sense involved in the controversy in this case, viz., as their Lordships understand it, the course which each car is to take from the start to the end of its journey. It is said that the word "service" embraces it, but it seems to their Lordships that

(1) (1869) L. R. 4 H. L. 171.

prima facie in its context it ought not to be so construed, and further, that if service were to be construed in a sense wide enough to include the marking out of routes, a great many of the special provisions which follow (1) would be superfluous, as already covered in the wide interpretation of "service." Indeed, clause 33 seems to be inconsistent with such an interpretation, for it assumes that the arrangements necessary to enable a passenger to have a continuous ride from any point on the railway to any other point on a main line or branch within the city limits are to be made by the company, though "with the approval of the engineer and the endorsation of the corporation." Therefore on the question of "routeing" also their Lordships agree with the view of Sedgewick J.

With regard to the question of stopping, which arises more specifically on the second appeal, the argument in favour of the company seems to their Lordships still stronger, for here there is a specific provision, clause 39, regulating the matter and negativing any other implied power in the engineer.

Their Lordships will therefore humbly advise His Majesty that an order should be made declaring and ordering:—

That neither the city nor the company have any street railway powers under the said agreement over streets within new territorial additions to the city during the term therein mentioned.

That under clauses 14 and 17 of the conditions the privilege to grant to another person or company for failure of the company to establish and lay down new lines and to open same for traffic, or to extend the tracks and services upon any street or streets as provided by the agreement, is the only remedy that the city can claim.

That subject to the above conditions it is for the company, and not for the city engineer with the approval of the city council, to determine what new lines shall be laid down on streets within the city as existing at the date of the agreement and what routes shall be adopted by the company.

That, subject to condition 39, it is for the company, and not for the city engineer, to determine where cars shall be stopped for the purpose of taking on and letting off passengers.

(1) E.g., 27, 28, 33, 36, 37, 38, 39.

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That the judgments of the Supreme Court and the Court of Appeal for Ontario be varied so far as is necessary to give effect to the above declarations.

And that the corporation do pay to the railway company the costs incurred by them in the several Canadian Courts in respect of the questions raised in these consolidated appeals so far as such costs have not already been awarded to them by any of the said Courts.

The corporation will pay to the railway company their costs of the consolidated appeals to His Majesty in Council.

Solicitors for appellants: *Freshfields.*

Solicitors for respondents: *Harrison & Powell.*

[PRIVY COUNCIL.]

J. C.* 1907 *March* 22; *May* 9.

LODEWYK JOHANNES DE JAGER . . . APPELLANT;

AND

THE ATTORNEY-GENERAL OF NATAL . RESPONDENT.

ON APPEAL FROM A SPECIAL COURT IN NATAL.

High Treason—Resident Alien's Duty of Allegiance—Special Leave to Appeal.

A resident alien within British territory owes allegiance to the Crown, and if he assists invaders during the absence of State forces for strategical or other reasons he is rightly convicted of high treason. Special leave to appeal from a judgment to that effect refused. There is no sufficient authority for the doctrine that the alien's duty of allegiance ceases if an enemy makes good his military occupation of the district in which the alien resides.

THIS was a petition for special leave to appeal from a judgment, reported in (1901) Natal L. R. p. 65, of a special Court constituted by Act XIV. of 1900 of the Colony of Natal, whereby on March 14, 1901, the petitioner was adjudged guilty of high treason and was sentenced to five years' imprisonment and to pay a fine of 5000*l.*

It alleged that the petitioner was a burgher of the late South African Republic, who for ten years and at the date of the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD ATKINSON, and SIR ARTHUR WILSON.

outbreak of war in 1899 was peaceably residing in Waschbank, in Natal, and continued to do so after the battle of Elandslaagte on October 21 of that year while the Boer forces occupied that part of Natal in which Waschbank is situated and the British forces had retired to Ladysmith, whereby he lost the effective protection of Her late Majesty; that the Boers administered the government and remained in occupation till March, 1900; that the petitioner was thereupon compellable to join, and did join, the Boer forces, and aided and assisted them both as commandant and as a commissioner and justice of the peace; and that after judgment as aforesaid he had undergone imprisonment and paid the fine imposed. The special Court was dissolved on March 12, 1903. The Act creating it neither granted nor withheld an appeal to Her late Majesty, and delay was due solely to financial difficulties. The petition sought special leave to appeal on the grounds that the judgment failed to distinguish between the allegiance which the petitioner owed to Her late Majesty while within her protection and the allegiance which he owed to the late South African Republic, between his rights and duties with regard to hostilities whilst he was actually enjoying the protection of the Queen and after he had ceased to enjoy it. It further contended that aid and assistance given to the South African forces after they had become capable of being compelled by those forces were justified and in no respect treasonable; and it submitted that the question was of general importance, involving the nature and extent of the rights and duties of a resident alien enemy and the due application of the law of high treason.

Sir R. Finlay, K.C., and *A. R. Kennedy*, for the petitioner, contended that the petitioner owed only a local and temporary allegiance to Her Majesty whilst he was a resident in Natal and was actually enjoying Her Majesty's protection. The obligation ceased to be binding upon him when he was deprived of that protection, and whilst, owing to the successful military occupation of the territory where he resided by the Boer forces, he was deprived of that protection, and was de facto under the government and control of the South African Republic. Aid and assistance given to the Boer forces by the

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petitioner under those circumstances were not treasonable, but acts which he was legally compellable to perform. It was not alleged against him that he had joined the invading forces prior to their having become established in possession and government of the territory. Thereupon, as a burgher of the Republic, he was compellable to serve. His duty of allegiance to the Queen had ceased, and his acts of service to his own Government were not treasonable as alleged. Reference was made to Coke's 3rd Inst. p. 4; Hale's Pleas of the Crown, vol. i. p. 94; Foster's Crown Cases, 2nd ed. (1776), 1st discourse, s. 2, 3rd ed. p. 185; 2 Halleck's International Law, 3rd ed. p. 450.

H. A. Colefax, for the respondent, was not heard.

1907 *May* 9.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV. of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or features of this case except the points of law upon which Sir Robert Finlay insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when

such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition.

There will be no order as to costs.

Solicitors for petitioner: *Tatham & Procter.*

Solicitors for respondent: *Sutton, Ommanny, and Rendall.*

[PRIVY COUNCIL.]

J. C.* 1907

Jan. 31; *April* 26.

DEMERARA ELECTRIC COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

WHITE AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

Liability for Nuisance—Grant of Statutory Powers—Construction.

The appellants acquired on the same day, and for the same local area, exclusive power under a lighting order to supply electrical energy for all purposes, public and private, and use the same for the purpose of any undertaking; and also under a tramways licence to generate and supply electrical energy as a motive power for tramways which they were required to make and operate, and for the lighting of their cars and offices.

The lighting order imposed as a condition that the appellants should be liable for any nuisance caused by them. The licence did not repeat this condition, and required as well as authorized the appellants to execute their works, anything in any ordinance of the Colony notwithstanding:—

Held, that, the appellants having accepted the lighting order as applying to the production of electricity for every purpose, the obligation not to create a nuisance imposed by that order applied to the tramways licence, which only repeated for a limited purpose the same authority as had been granted by the order.

APPEAL from an order of the Supreme Court (March 31, 1905).

The question decided was as to the liability of the appellants for a nuisance caused by them, in the manner described in their Lordships' judgment, to their neighbours by the noise and vibration resulting from their using their machinery and engines—whether they were protected therefrom by reason of acting within their statutory powers.

The Supreme Court found on the evidence that a nuisance had been caused in fact, and granted an injunction on the grounds that the nuisance, if unabated, would be a continuing one, and might increase if additional engines were thereafter

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY and SIR ARTHUR WILSON.

erected, and that there were no means by which the Court could estimate with accuracy the sums which should be awarded as compensation, not only for damage already sustained, but also for prospective damage due to the same cause. They, however, suspended the operation of the injunction, for the reasons that the removal of the injury complained of must take some time; that the appellants, being not only authorized but required to supply electricity, would be subjected to heavy penalties, and that much public inconvenience would be caused if the injunction were made immediately operative, while the respondents would not be excessively damnified by the continuance for a short period of the vibration, which had been felt for more than four years.

Warmington, K.C., and *C. James*, for the appellants, contended that on the evidence it was not proved that any nuisance had been in fact caused to the respondents. If it had been, the injury could have been fully compensated by damages, and an injunction under the circumstances was unnecessary. And it was caused by acts which the appellants were authorized and required by ordinance of the Colony or licence of the Governor in Council to perform. The Electric Lighting Order of 1899, duly granted under an ordinance of 1890, imposed on the appellants under penalties an obligation to supply electrical energy. There was no proof of any negligence in the execution of their powers; on the contrary, the evidence shewed that the appellants had done all that science, skill, and care could effect to prevent a nuisance. Although clause 66 of the lighting order provided in effect that the appellants should be liable for any nuisance created by them, the tramways licence did not repeat that provision, and the vibration complained of was chiefly due to the generation of electricity for the purpose of working the tramways. And the licence required them to operate the tramways daily and every day, and required that the cars and carriages should be propelled by electricity. It was not intended that the liability for nuisance imposed by the lighting order should apply to the licence; if it had been so intended, the provision to that effect would have been repeated. Reference was made to *London and*

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Brighton Ry. Co. v. *Truman* (1); *Metropolitan Asylum District* v. *Hill* (2); *Westminster Corporation* v. *London and North Western Ry. Co.* (3); *Shelfer* v. *City of London Electric Lighting Co.* (4); *Brocklehurst* v. *Manchester, &c., Steam Tramways Co.* (5)

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This case, which was heard ex parte, was an appeal by the Demerara Electric Company, Limited, from a final sentence of the Supreme Court of British Guiana.

At the instance of the respondents, who are owners and occupiers of house property in the city of Georgetown in the immediate neighbourhood of the power house or generating station belonging to the appellants, the Supreme Court awarded an injunction restraining the appellants from using their machinery and engines so as to occasion a nuisance by noise and vibration to the respondents, or any of them, or the owners or occupiers of their houses. And the appellants were ordered to pay $100 to each of the respondents by way of damages.

The defence to the action was twofold. The appellants maintained (1.) that there was no nuisance in fact, and (2.) that they were protected by statutory authority in doing what they had done. They also argued that if there was a nuisance in fact, and if they were not protected by their statutory powers, the matter complained of was not of such a character as to entitle the respondents to an injunction—damages, they said, would be the more appropriate remedy.

On each of these three points the Supreme Court decided against the appellants.

As regards the existence of the nuisance complained of and its serious character, their Lordships agree with the learned judges of the Supreme Court who heard the oral evidence and saw the witnesses produced at the trial.

The defence set up on the ground of statutory authority remains to be considered.

(1) (1885) 11 App. Cas. 45.
(2) (1881) 6 App. Cas. 193.
(3) [1905] A. C. 426.
(4) [1895] 1 Ch. 287, 313.
(5) (1886) 17 Q. B. D. 118.

The appellants were incorporated by the Demerara Electric Company Ordinance, 1899, with a capital of $500,000. The objects of the company included the acquisition, construction, maintenance, and operation of electric works and appliances for the purpose of generating, supplying, and distributing electricity for lighting and heating purposes and as a motive power, and the acquisition, maintenance, and operation of electric tramways in the Colony, including power houses or stations in connection therewith, and the obtaining of orders or licences under the Electric Lighting Ordinance, 1890, or any other ordinance for any such purpose.

The company seems to have been formed for the purpose of acquiring and combining two separate undertakings—the undertaking of the Georgetown Tramways Company, Limited, which was then worked by animal power, and the undertaking of the British Guiana Electric Lighting and Power Company, Limited.

By the Georgetown Electric Lighting Order, 1899, the undertakers for the purposes of that order acquired "the exclusive right for the period of thirty years, and any extension thereof under the provisions of the principal ordinance," meaning thereby the Electric Lighting Ordinance of 1890, as subsequently amended, "to supply energy for all public and private purposes, and to use the same for the purposes of any undertaking lawfully carried on by the undertakers within the area of supply": s. 7. The expression "the undertakers," as defined in the order, included the Demerara Electric Company and their lessees or assigns. The expression "the area of supply" included the city of Georgetown and its environs within a distance of five miles of the limits of the city.

Sect. 66 of the Georgetown Electric Lighting Order, 1899, is in the following words: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused by them."

On the day on which the Georgetown Electric Lighting Order, 1899, was issued the appellants obtained a licence under the Tramways Ordinance, 1899, authorizing them to construct, maintain, and operate tramways in the city of Georgetown and

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its vicinity. The licensees were thereby granted the exclusive right, and were thereby required, within the area thereinafter defined, which was co-terminous with the area of supply mentioned in the Georgetown Electric Lighting Order, 1899, to lay down, make, maintain, and operate daily, and every day, the tramways thereinafter described. They were also thereby "authorized and empowered to generate, accumulate, distribute, and supply electrical energy as a motive power and for the lighting of the cars and carriages used thereon, and of the offices, stations, buildings, and works of the licensees," *anything in any ordinance of the Colony notwithstanding*. And they were directed to do and execute all and any works necessary for the efficient construction, equipment, and operation of the tramways.

Armed with the powers thus conferred, the appellants purchased and combined the undertakings formerly carried on by the two old companies, using as their power house or generating station the power house or station of the old electric company. There they erected larger engines and more powerful machinery in order to work both branches of their business. The two branches were worked together. It was, as their manager, Mr. Bruce, said, "all one system under one roof." So working, they caused the nuisance of which the respondents complained.

It will be observed that at the time when the tramways licence was granted the appellants were already in possession of the exclusive right of generating and distributing electrical energy for all public and private purposes and using it for the purposes of any undertaking lawfully carried on by them within the area of supply. It would seem, therefore, that the authority "to generate, accumulate, distribute, and supply electrical energy," contained in the tramways licence of 1899, was unnecessary so far as the appellants were concerned, and so long as they worked the tramways themselves. That authority, on which so much reliance was placed by the learned counsel for the appellants, is to be found in the Tramways Ordinance, 1899. It therefore naturally has a place in the licence itself. A reason for its insertion, if a reason is wanted, may be that, although such a provision is superfluous and idle so long as the appellants continue to work the tramways, it would be effective and useful

in the event of the local authority electing to purchase the tramways under the compulsory powers contained in the ordinance of 1899. The final words "anything in any ordinance of this Colony notwithstanding" seem to point to the Georgetown Electric Lighting Order, 1899, and to have been added in order to prevent the working of the tramways being interfered with in any event by the monopoly already granted to the appellants.

It is quite true that the condition imposed by s. 66 of the lighting order is not repeated in the licence. It appears to their Lordships, however, impossible to infer from this circumstance that in connection with one of the two main purposes for which electricity was required by the appellants they are by implication relieved from an obligation imposed by a contemporaneous instrument, and accepted by them as applying to the production of electricity for every purpose, motive power as well as lighting and heating.

The learned judges of the Supreme Court treated the authority to generate and distribute electrical energy contained in the tramways licence as superseding the authority to generate and distribute electrical energy as a motive power contained in the Demerara Electric Ordinance, 1899. So treating it on a careful review of the authorities bearing on the subject, including *Metropolitan Asylum District* v. *Hill* (1) and *London and Brighton Ry. Co.* v. *Truman* (2), and on consideration of the provisions of the tramways licence and all the circumstances of the case, the learned judges came to the conclusion that the appellants were not authorized by the tramways licence of 1899 to cause a nuisance. Their Lordships agree in that conclusion, although they think the same result might have been reached by a shorter and simpler road.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, but that such dismissal should be without prejudice to any application which the appellants may be advised to make to the Supreme Court for the suspension of the injunction awarded by the final sentence of the said Court.

Solicitors for appellants: *Druces & Attlee.*

(1) 6 App. Cas. 193. (2) 11 App. Cas. 45.

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[PRIVY COUNCIL.]

STANDARD BANK OF SOUTH AFRICA, LIMITED . . . . . } Appellants;

AND

HEYDENRYCH . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of South Africa—Insolvency Liquidation—Preferential Right to Payment—Priority as between Mortgagees depends upon Date of Advances, not of Registration.

Upon an issue as to preferential claim to payment in a liquidation upon an insolvency, it appeared that the mortgage bond under which the appellants claimed was prior in date of execution and registration to that set up by the respondent, but that no present debt was created by the appellants' bond, and no moneys had been advanced to the insolvents thereunder prior to their incurring debts to the respondent:—

Held, that by the Roman-Dutch law applicable to the Cape Colony preference must be determined by the date of the debts, and not of the securities, and that the respondent's actual advances, being prior to that of the appellants, were entitled to priority of payment.

Appeal from an order of the Supreme Court (February 24, 1906), setting aside an order of Buchanan J. (May 25, 1905).

Under the circumstances stated in the judgment of their Lordships, the respondent applied calling upon the trustee of the insolvent estate of Mackie, Young & Co. and the appellant bank to shew cause why the account and plan of distribution framed by the trustee should not be amended by disallowing the preference awarded to the bank under their general mortgage bond, dated April 23, 1901, and ceded to the bank on December 12, 1902, by Creswell, Sons & Co., the original mortgagees. The application was refused by the first Court, but the order of the Supreme Court in effect disallowed the appellants' claim to priority.

The respondent was a preferential creditor under four

* *Present:* The Lord Chancellor, Lord Robertson, Lord Collins, Sir Ford North, and Sir Arthur Wilson.

mortgage bonds of a date later than December 12, 1902. The acceptances held by the appellants were all subsequent to that date; and the respondent's claim as preferred by him was that the claim made by the appellants was "in respect of liabilities incurred by the insolvents subsequent to the cession of the bond to the said bank, by virtue of which they claimed," and that this bond only secured preference for such debts as were owing at the date of cession, and that the appellants should therefore be admitted as concurrent and not as preferential creditors.

Both Courts held that the appellants could claim under the ceded mortgage bond the same privileges as their predecessors in title, and the arguments at the hearing dealt only with that question. The appeal Court, however, directed the attention of the parties to the question "whether the firm itself would have had a preference under its general covering bond in respect of debts of a later date than debts due by the insolvents to the applicant and secured by the general clause of the bond in his favour."

The Supreme Court in the result directed that any preference awarded to the bank in respect of debts incurred by the insolvents to the firm of Creswell, Sons & Co. after any of the debts incurred by the insolvents to the respondent be set aside, and that a fresh distribution account be framed, according to which the preference under the different duly registered covering bonds be awarded according to the priority of the dates when the debts respectively proved were originally incurred.

Danckwerts, *K.C.*, *Buckmaster*, *K.C.*, and *Bisschop*, for the appellants, contended that the bonds of the appellants and respondent, when duly registered, rank against the insolvents' estate in priority according to their respective dates, the bonds having all been registered in the same order as the order of their dates. The bond held by the appellants created, according to its true construction, actual debts, and mortgaged the insolvents' property therefor as from its date. Those debts could only be discharged by due compliance with the conditions of the bond, and on the evidence there had been no compliance. It was erroneous to say that no debts arose under the bond unless and

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until advances were made to the insolvents. By the law and practice of the Colony the priority of the appellants' and respondent's bonds dates from registration, or according to the dates of execution where registration is in the same order as the dates of execution, and accordingly the appellants are entitled to priority and preference over the respondent. They referred to *In re Insolvent Estate of Loudon* (1); *In re Russouw* (2); *Hare* v. *Trustee of Heath* (3); *In re Mostert* (4); *In re Carter*. (5) Registration governs priority: see Grotius, ch. ii. c. 48, ss. 22, 23, 24, tit. "Mortgage"; Institutes of Cape Law, by Maasdorp, vol. 2, pp. 282, 283; *Preston* v. *Dania* (6); *Bonafous* v. *Rybot* (7); *Hopkinson* v. *Rolt* (8); *Bradford Banking Co.* v. *Briggs* (9); *Union Bank of Scotland* v. *National Bank of Scotland* (10); *West* v. *Williams*. (11) As long as the first mortgagee has no notice of the second mortgage he can make advances to which a preferential right of payment over the second mortgage will be accorded; after notice if he does so he has no priority: *In re O'Byrne's Estate*. (12)

Gore-Browne, K.C., and *Mackarness*, for the respondent, contended, that the doctrine of tacking later incumbrances to earlier ones was unknown to the Roman-Dutch law prevailing in Cape Colony. The bank could not, therefore, tack on debts incurred after the cession of the bond to debts incurred to Creswell, Sons & Co., the original mortgagees, before that cession. The bank could not by so doing gain a priority for those later debts over debts to the respondent which were of earlier date. Even if the bank were entitled to the full rights which would have been enjoyed by the original mortgagees if no cession had taken place, still priority was in order of the dates of advances, and not of either registration or execution of the bonds. By Roman-Dutch law, where a mortgage bond was passed to secure future advances the mortgage did not come

(1) (1829) 1 Menzies, 380.
(2) (1830) 1 Menzies, 479.
(3) (1884) 3 Juta, 32, 34.
(4) (1837) 2 Menzies, 329.
(5) (1837) 2 Menzies, 335.
(6) (1872) L. R. 8 Ex. 19.
(7) (1763) 3 Burr. 1371.
(8) (1861) 9 H. L. C. 514.
(9) (1886) 12 App. Cas. 29.
(10) (1886) 12 App. Cas. 53.
(11) [1899] 1 Ch. 132, 143.
(12) (1885) 15 L. R. Ir. 189.

into operation until the advances were actually made and the debts to be secured actually incurred. Consequently the bank had no preference over the respondent in respect of advances subsequent to those made by the respondent under his registered bonds. Priority between them was regulated by the dates of the advances, and was not according to the dates of registration. Reference was made to Voet's Commentary on the Pandects, 20–4, 30. The Dutch Consultations therein cited were quoted in extenso. They also referred to Pothier's Commentary on the Pandects (citing Gaius and Papinian), bk. 20, tit. 4, s. 1, art. 1 (3), and his Traité de l'Hypothec, c. 1, s. 3; Burge's Colonial Law (1838 ed.), vol. 3, p. 179; *West* v. *Williams*. (1) By the law of the Cape Colony it was well settled that registration of a bond was notice to all the world: *Hare* v. *Trustee of Heath* (2); Maasdorp's Institutes of Cape Law, vol. 2, p. 232.

Buckmaster, *K.C.*, replied.

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June 20.

The judgment of their Lordships was delivered by

Lord Collins. The question on this appeal is one of preference between creditors in the insolvency of Messrs. Mackie, Young & Co., a firm carrying on business in Cape Town. On April 23, 1901, a general notarial bond was passed by the above firm in favour of Creswell, Sons & Co., who were about to act as their agents in London. By the said instrument the obligors acknowledged themselves bound to Creswell, Sons & Co., thereinafter styled the mortgagee, in the sum of 5000*l*., and, after reciting that they, desiring to extend their business operations, had applied to the mortgagee to be granted an open credit and certain other facilities which the mortgagee had agreed to grant on certain terms, they declared the condition of the bond to be that, if they should pay at due dates to the mortgagee all sum and sums of money which then or at any time thereafter should be or become due by them to him, whether arising from promissory notes, drafts, acceptances, goods sold and delivered, interest, charges, moneys paid or from what cause soever, and should perform all the conditions agreed upon between them and

(1) [1899] 1 Ch. 132. (2) 3 Juta, 32, 34.

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the mortgagee, then those presents should be null and void, but otherwise of full force and effect.

This bond was registered at the Deeds Office in Cape Town on April 25, 1901.

On December 12, 1902, it was ceded by the mortgagee to the Standard Bank (the now appellants), and the cession was registered on December 5, 1903. In determining the rights to preference in the liquidation on the insolvency of Mackie, Young & Co., the Master held that the Standard Bank were entitled to preference as against the now respondent, and that decision was upheld by Buchanan, acting C.J., on appeal. But the point now raised before their Lordships did not come up for discussion. Nor when the case came on appeal before the Supreme Court was the point raised by the parties. It was, however, taken by the Court itself, who accordingly directed a re-argument, and, though agreeing with the opinion of the Court below on the argument as there presented, reversed their decision and gave judgment awarding a preference to the now respondent, and it is against that judgment that the present appeal is brought. The Court, on looking closely into the facts, ascertained that, at the date of the incurring by the insolvents of the debts in respect of which the now respondent claimed preference, no sum had yet been lent by Messrs. Creswell or the Standard Bank to the insolvents under their security; that thus, though the bond under which the bank claimed was prior in date of execution and of registration to that set up by the respondent, still preference was to be determined by the date of the debts and not of the securities, and that a security earlier in point of date but under which no advance had been made must therefore give place to one that was later but given for an actual advance. The learned counsel for the appellants could not dispute that the law as laid down by Sir H. de Villiers C.J., based as it was on a passage from Gaius, confirmed by modern authorities, was correct; but he sought to raise a distinction upon the special terms of the bond relied on by the appellants. His contention was that the bond itself evidenced a present debt, and that therefore the security was effective from its date. But it is quite clear that no present debt was in fact created by the

bond. In certain events which might or might not happen a debt might arise which might be described as solvendum in futuro, but until those conditions were fulfilled nothing became debitum at all, either in the present or the future. This disposes of the main argument for the appellants. A faint suggestion was, however, made that the appellants, notwithstanding the fact that the respondent's security was on the register and an advance was made under it before the appellants had found any money for the mortgagor, must be assumed to have had no notice of the registration of a security subsequent in date to their own, and therefore were entitled to preference for their advance notwithstanding the intervening security and advance under it of the respondent. But even if, consistently with the Cape law as above ascertained, the absence of notice of the existence of a security subsequent to their own could be material, where on the facts the later security had been followed by an advance before anything had been advanced by the appellants, the onus was clearly upon the appellants to establish the absence of notice, actual or constructive, having regard to what is laid down both by Buchanan J. and by the Supreme Court as to the effect of the law and practice with regard to the registration of such deeds in the Colony. But no authority was cited, or principle invoked, which in any way threw doubt on the position thus taken by the learned judges in both Courts below, and it seems, therefore, unnecessary to pursue the point further.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Stibbard, Gibson & Co.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1907 — May 13; July 4.

COMMISSIONERS OF TAXATION . . . . PLAINTIFFS;

AND

MOONEY . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

New South Wales Land and Income Tax Assessment Act, 1895—*Regulations thereunder—Return compulsory of Income of whatever Amount—Default Assessment conclusive unless questioned under the Act.*

Under the New South Wales Land and Income Tax Assessment Act of 1895 (59 Vict. No. 15), and the regulations made thereunder, every person in the receipt of any income of whatever amount is bound to make a return thereof to the Commissioners in the prescribed form, although after all authorized deductions it does not exceed the taxable limit of 200*l.* If he neglects to do so the Commissioners may make a default assessment, which becomes binding and conclusive unless questioned by appeal under the Act.

The High Court of Australia having ruled to a contrary effect:—

Held, on appeal therefrom, leave having been granted on special terms as to costs and subject to the default assessment being amended if so directed, that a default assessment by the Commissioners of 225*l.* should be reduced to a nominal amount, and that they should pay to the respondent his costs of this appeal as between solicitor and client.

APPEAL by special leave and on special terms from a judgment of the High Court of Australia (December 22, 1905), reversing by a majority a judgment (May 16, 1905) of the Full Court of New South Wales.

The question at issue in the action was whether the appellants were entitled to recover, under the circumstances stated in the judgment of their Lordships, from the respondent 225*l.* for income tax in respect of the year 1904 and 22*l.* 10*s.* by way of fine. The question depended on the true construction of the Acts relating to income tax in the State of New South Wales.

The action was commenced on September 5, 1904, to recover the tax and fine under ss. 48 to 51 of the Act. The case came on for trial before Simpson J. and a jury of four persons. The

* *Present:* THE LORD CHANCELLOR, LORD ASHBOURNE, LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

plaintiffs relied on their own default assessment as conclusive evidence, and objected to the admission of any other evidence as to the defendant's income. The defendant contended that he had not in fact at the time of assessment a taxable income exceeding 200*l.* per annum. His income for 1903 was under 50*l.* Other receipts were sale moneys of a mine of which he was part-owner, and were of capital, and not of income. The jury were discharged by consent, and a verdict was formally entered by arrangement for the defendant, with leave to plaintiffs to move before the Full Court to have a verdict entered for them or for a new trial. Simpson J. stated that he expressed no opinion one way or the other as to the plaintiffs' right to recover.

The Supreme Court on May 16, 1905, gave judgment for the plaintiffs for the amount sued for (247*l.* 10*s.*) and costs. The Court held that the assessment, not having been appealed from, was conclusive and could not be disputed in the action.

On appeal by special leave to the High Court of Australia, that Court by a majority of two judges to one (Griffith C.J. and Barton J.) (O'Connor J. dissentiente) allowed the appeal with costs, and ordered the verdict formally returned for the defendant at the trial to be restored. The view of the Chief Justice was that as the actual income of the respondent was not within the taxable area, he was not liable to make a return under the terms of the Act and in the absence of a regulation to that effect made thereunder by the Governor in Council. Consequently there was no default by the respondent, and the condition precedent to the exercise of jurisdiction by the appellants had not happened.

Wise (*K.C.* of New South Wales Bar) and *Vaughan Hawkins*, for the appellants, contended that they had under the Act of 1895 jurisdiction to determine for the purposes of the Act, and subject to appeal as by the Act provided, whether the sale moneys in question were income within its meaning. They referred to s. 68, which defined income, and ss. 15 and 16, which imposed a charge thereon. They referred also to s. 30 and following sections, which deal with returns and the making of assessments, and to s. 44 and the two following sections, which provide appeals

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from assessments, and to ss. 47 et seq., which provide for the recovery of the amount assessed. Regulations of February 12, 1896, made under the Act prescribed the mode of making returns. The respondent did not make any return, and did not appeal from the Commissioners' default assessment. That omission did not affect their jurisdiction. The assessment book prepared by them was for the purpose of the proceedings in the Supreme Court conclusive evidence against the respondent of the making of the assessment, the amount of his taxable income, and of the sum due in respect of the tax. Independently of their jurisdiction the Commissioners had proved in these proceedings that the amount claimed by them was justly due.

Danckwerts, K.C., and *Alfred Adams*, for the respondent, contended that, the sale moneys not being income, the respondent's income for 1903 was under 200*l*., and not taxable. He was not, therefore, under the Act of 1895 a person liable to taxation, nor a person required thereby, or by any regulation thereunder, to furnish any return for income tax. There was, therefore, no default by him in not making a return. Consequently the Commissioners had no jurisdiction to make a default assessment, and, if they did so, the respondent was not bound to appeal therefrom. The respondent relied on the invalidity under all the circumstances of their assessment as an answer to the action. They referred to *Milward* v. *Caffin* (1); *Governors of Bristol Poor* v. *Watt* (2); *Charleton* v. *Alway* (3); *Harrison* v. *Bulcock*. (4)

Wise, K.C., replied.

1907 *July* 4.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the High Court of Australia. By a majority of two judges to one that Court reversed the unanimous judgment of the Full Court of New South Wales.

The case involves a question of some importance in the administration of the income tax laws of New South Wales.

By the combined effect of the Land and Income Tax Assessment

(1) (1780) 2 W. Bl. 1330.
(2) (1834) 1 Ad. & E. 264, 280.
(3) (1840) 11 Ad. & E. 993.
(4) (1788) 1 H. Bl. 69.

Act of 1895 (59 Vict. No. 15) and the Income Tax Act of 1895 (59 Vict. No. 17) a tax of 6*d.* in the pound is imposed on all incomes exceeding 200*l.* per annum. Incomes below that amount after all authorized deductions are made are not liable to income tax.

The respondent Edward Joseph Mooney, a resident in New South Wales, omitted to furnish a return of his income for the year 1903 required by the Commissioners of Taxation as the basis of assessment for the year 1904. The Commissioners having discovered that he had been in the receipt of large sums of money in 1903, treated him as a person in default, and made according to their judgment an assessment upon him. Due notice of this assessment was given. Mooney, however, disregarded the notice altogether. Thereupon the Commissioners proceeded to make up the assessment book, and charged Mooney with 225*l.* as income tax payable by him for the year 1904. As Mooney did not question this assessment in the Court of review, the Court specially appointed to hear and determine income tax appeals, the Commissioners in September, 1904, brought this action to recover the 225*l.*, together with the prescribed fine. They relied upon the assessment book as conclusive evidence of the defendant's liability. At the trial, after evidence had been given on the part of the defendant to explain his receipts in 1903, the jury were discharged by consent, and a formal verdict was entered for the defendant, with leave to the plaintiffs to move before the Full Court to have the verdict entered for them. The Full Court gave judgment for the plaintiffs for the amount claimed. The Court held that the assessment, not having been appealed from in the prescribed manner, had become conclusive, and that it could not be disputed in the action.

The defendant then appealed to the High Court by special leave of that Court. The appeal was allowed with costs, and the verdict in favour of the defendant was restored.

Special leave to appeal to His Majesty was granted on the terms of the Commissioners submitting to abide by any direction His Majesty might be pleased to make as to the amendment of the assessment, and also, if so directed, to pay the respondent's costs of the appeal in any event as between solicitor and client.

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In the High Court Griffith C.J. and Barton J. held that the default assessment was not conclusive, and that the Commissioners were in error in treating Mooney's receipts in 1903 as income for the purpose of assessing income tax, as those receipts were proved at the trial to have been proceeds of the sale of Mooney's share in a mineral property. They also held that, inasmuch as Mooney's income for the year 1903, excluding those receipts, was below 200*l.*, he was not (to use the expression of the Chief Justice) "within the area of taxation," and therefore not bound by anything in the Act No. 15 of 1895 to make a return at all.

O'Connor J., on the other hand, agreed with the Full Court of New South Wales. Taking a broader view of the Act, he held that every person in the enjoyment of an income, whatever the amount might be, was bound to make a return to the Commissioners, and he held, further, that the default assessment, not having been questioned in the only manner in which it was competent for Mooney to question it, became binding and conclusive.

It is not necessary, in their Lordships' opinion, to compare or discuss the conflicting views of the learned judges of the High Court, because it appears to them that if the attention of the High Court had been called to certain regulations under the Act of 1895 which "have the force of law," the Chief Justice and the learned judge who agreed with him would probably have concurred in the result at which O'Connor J. arrived.

The provisions in the Act as regards "assessments, returns, &c.," are contained in Part V., which is so headed, and are as follows:—

"30. (i.) The Commissioners shall, in the prescribed manner, give, or cause to be given, not less than thirty clear days' public notice of the time and place at which all persons liable to taxation personally, or in any representative capacity under the provisions of this Act, shall furnish returns for the purpose of assessment of land and income tax; such notice shall state the place at which the prescribed forms of return may be applied for and obtained, and it shall be the duty of all such persons, and of all persons required by this Act or any regulation thereunder to furnish any such returns, to apply for the prescribed

forms of returns, and any person failing to furnish any such return shall not be relieved from any penalty by reason only of his having received no notice to furnish the same, or of the prescribed form of return not having been delivered to him; but the Commissioners may, if they deem it so advisable, cause forms to be delivered by the assessors or sent by post.

"(ii.) Every such person shall, upon the publication of such notice, prepare and deliver, in the prescribed manner, within the period to be mentioned in such notice, to the person appointed to receive the same, a return in the form prescribed . . . . of the particulars of the income, and of all other details in relation thereto which may be prescribed; such return shall be signed by the taxpayer, or by his agent duly authorized in that behalf.

* * * *

"(v.) The returns furnished by or on behalf of every person required to furnish returns under this Act shall contain such particulars, be in such form, and be furnished to the Commissioners at such time as may respectively be prescribed or publicly notified."

"39. (i.) If any person makes default in furnishing any return of lands or income, or if the Commissioners are not satisfied with the return made by any person, they may make an assessment of the value or amount on which in their judgment tax ought to be charged, and the tax shall be payable accordingly.

"(ii.) Every such assessment shall be subject to appeal."

In Part VI., headed "Appeals, Collections of Taxes, &c., Regulations, Penalties, &c.," ss. 56, 57, and 58 are in the following terms:—

"56. The Governor may by regulation prescribe and regulate:—

* * * *

"(iii.) The returns to be furnished to the Commissioners, and the form and contents thereof, and the time and mode of furnishing the same; the form, time, and manner of giving notices of appeal."

* * * *

"57. The Governor may make all such other regulations, either applicable generally or to meet particular cases, as may be

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necessary or desirable to carry out the objects and purposes of this Act, or as may be convenient for the administration thereof."

"58. All such regulations shall be published in the Gazette and shall be laid before both Houses of Parliament within fourteen days from the publication thereof, if Parliament be then sitting, and if Parliament be not then sitting, then within fourteen days after the beginning of the next session, and upon publication in the Gazette all such regulations shall have the force of law."

Commenting upon these sections the learned Chief Justice says: "I cannot doubt . . . . that the Governor might make regulations requiring persons in receipt of money from any source to furnish returns for the purpose of ascertaining whether the money so received was income or whether it exceeded 200*l.* in the year, and was so liable to income tax."

Then he adds, "No such regulations, however, have been made." That seems to have been the view both of the learned judges and the learned counsel on both sides in the High Court.

On the argument before this Board the attention of the Court was called to certain regulations duly made and gazetted, which seem to meet exactly the point suggested by the Chief Justice.

Regulations made under the Act, and gazetted on February 12, 1896, provided, paragraph II., that those regulations were to be construed and read according to the interpretations provided by the Act, as well as by the interpretations therein additionally provided. As regards "Returns and Assessments, &c.," paragraph V. provided that the return of income required by the Act to be made "by or on behalf of a person" should be in the form marked D in the schedule. The original form D was amended more than once. The form current in the year 1904 was published in the Government Gazette of December 1, 1899. It is headed by a reference to the Income Tax Acts. Then follow the words:—

"Return of Income.

"For the year ending 31st of December, 189 .

"Person, Firm, or Trustee.

"In pursuance of the above Acts and of the regulations made thereunder every person in receipt of income within the meaning

of the said Acts is required to fill up the following return as far as is applicable to his particular case, and deliver the same at or forward it by post to the office of the Commissioners of Taxation, Sydney, on or before the day of .

" Commissioners of Taxation."

Then, after a reference to the penalties for default, come the usual particulars required in such a return, including details of income from all sources, and a statement of account intended to shew the net amount of income, and a declaration by the person making the return to the effect " that the same and the statements therein referred to or accompanying such return contain true and accurate details of the several matters and things set forth, and in particular contain a true and accurate account of all income derived by " the declarant " during the year ending 31st December, 189 ."

The word " income," as defined in the Act, " includes profits, gains, rents, interest, salaries, wages, allowances, pensions, stipends, charges, and annuities."

The learned counsel at the Bar were unable to explain how it was that this regulation was not called to the attention of the High Court. It was not denied that form D requires every person in receipt of income within the meaning of the Income Tax Acts, whatever the amount of such income may be, to make a return to the Commissioners. It was not disputed that the regulation prescribing form D was authorized by s. 57 of the principal Act, even without calling in aid ss. 30 and 56. It certainly is convenient for the administration of the Income Tax Act—it must be desirable, and indeed necessary, in order " to carry out the objects and purposes " of the Act—that all persons in receipt of income should be bound to make returns if so required. If everybody is to be a law unto himself, and to judge whether he is within the " area of taxation," it would no doubt result in there being a wide margin of debatable ground, and the powers of the Commissioners would be crippled if not paralyzed.

The learned counsel for the respondent suggested that the expression " income within the meaning of the said Acts " ought to be understood as confined to income exceeding 200*l.* a year. The language, however, as well as the purpose of the regulation,

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appears to their Lordships to be too clear to admit of any construction other than the plain and natural meaning of the words used.

It was not disputed that in the year 1903 the respondent Mooney was in receipt of income to the amount of 50*l.*, or income not exceeding 50*l.* He was therefore, in their Lordships' opinion, bound to make a return in the prescribed form. Not having done so, he was in default, and the Commissioners therefore were apparently within their rights in making a default assessment.

Having regard to the terms of the order granting special leave to appeal, their Lordships do not think it necessary to consider whether it would have been competent for the respondent in the action brought against him by the Commissioners to question the assessment if there had been no regulation in force requiring returns from all persons in receipt of income. They agree with the High Court that a change in the form of property by a person who does not traffic in that kind of property cannot be regarded as producing income taxable under the Income Tax Acts. They propose, therefore, to amend the assessment.

Their Lordships think the justice of the case will be met by an order discharging the order of the High Court, except as to costs, and directing a verdict to be entered for the Commissioners for a nominal amount, and ordering the Commissioners to pay the respondent his costs of this appeal as between solicitor and client. Their Lordships will therefore humbly advise His Majesty accordingly.

Solicitors for appellants: *Light & Fulton.*
Solicitors for respondent: *Bell, Brodrick & Gray.*

[HOUSE OF LORDS.]

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1907
May 30.

S. PEARSON & SON, LIMITED . . . . . APPELLANTS;

AND

LORD MAYOR, &c., OF DUBLIN . . . . RESPONDENTS.

Contract—Action of Deceit—Fraudulent Representations—Verification of Representations by Contractor—Principal responsible for Fraud of Agent—Public Authorities Protection Act, 1893 (56 & 57 *Vict.* c. 61), *s.* 1.

A contractor having sued the other party to the contract (a public authority) in an action of deceit for damages for fraudulent representations made by the agent of the public authority as to the nature of the works to be executed, one defence was that by a provision in the contract the plaintiff must verify all representations for himself and not rely on their accuracy. Another defence was that the action was not brought in due time within the Public Authorities Protection Act, 1893:—

Held, that the contract, truly construed, contemplated honesty on both sides, and protected only against honest mistakes; and that the Public Authorities Protection Act, 1893, did not apply, the act complained of not being done in pursuance of a public duty within the meaning of the statute.

Decision of the Court of Appeal in Ireland, [1907] 2 I. R. 27, 82, reversed, and decision of the King's Bench Division (Ireland) restored upon the ground that there was a question of fact for the jury upon the allegation of fraud. The question of the liability of a principal for the fraud of his agent discussed.

THE Dublin Corporation having by their agents furnished the appellants with plans, drawings and specifications, the appellants contracted to execute certain sewage outfall works according to the plans, &c. In the plans, &c., representations were made as to the existence and position of a certain wall. In the contract (clauses 43, 46, 47, 48) it was stipulated that the contractor should satisfy himself as to the dimensions, levels and nature of all existing works and other things connected with the contract works; that the corporation did not hold itself responsible for the accuracy of the information as to the sections or foundations of existing walls and works; and that no charges for extra work or otherwise would be allowed in consequence of incorrect information or inaccuracies in the drawings or specifications. The appellants performed the contract, and brought an action of deceit against

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the corporation, claiming damages for false representations as to the position, dimensions and foundations of the wall, whereby the appellants were compelled to execute more costly works than would otherwise have been required. The plans, drawings and specifications were prepared by engineers employed by the corporation.

The evidence given at the trial before Palles C.B. is stated in the judgments in this House. Palles C.B. refused to leave any question to the jury, and entered judgment for the respondents on the ground that the contractors were bound by their contract to verify for themselves all the information given in the plans, &c.

The King's Bench Division (Wright, Boyd and Gibson JJ., Lord O'Brien C.J. dissenting) reversed the decision of Palles C.B., and entered judgment for the appellants on the ground that there was a question of fact for the jury upon the allegation of fraud.

The Court of Appeal (Sir Samuel Walker L.C., Fitzgibbon and Holmes L.JJ.) reversed that decision, and restored the decision of Palles C.B. Hence this appeal.

The corporation relied on another defence, viz., that the action had not been brought within six months next after the act complained of within the meaning of the Public Authorities Protection Act, 1893. This defence was overruled by Palles C.B. and the King's Bench Division on the ground that the action was not brought "for any act done in pursuance of any public duty or authority," the cause of action being in respect of an alleged fraud arising out of a private contract. This decision was affirmed by the King's Bench Division and in this House. The Court of Appeal expressed no opinion on this point.

April 16, 17, 18. *Campbell, K.C.* (of the Irish Bar), *Danckwerts, K.C.*, and *E. A. Collins* (of the Irish Bar), for the appellants.

C. A. O'Connor, K.C., Ronan, K.C., Ignatius J. O'Brien, K.C., and *P. A. O'C. White* (all of the Irish Bar), for the respondents.

The House took time for consideration.

May 30. Lord Loreburn L.C. My Lords, this is an action for deceit brought by Messrs. Pearson & Son, contractors, against the Dublin Corporation. Inasmuch as I am about to propose that the case be remitted for a new trial, it is desirable that I should say no more than is necessary to explain my view.

The plaintiffs' case is that they were induced to enter into a contract for the construction of certain sewage works by statements made by and on behalf of the defendants as to the existence to a depth of nine feet below ordnance datum of an old wall. Undoubtedly evidence was adduced at the trial from which the jury might, if they thought right, conclude that the plaintiffs were so induced by statements made on behalf of the defendants. Also, there was evidence for the jury that those statements were made either with a knowledge of their falsity, or (which is the same thing) with a reckless indifference whether they were true or false, on the part of the engineers employed by the defendants to make the plans which were submitted to plaintiffs as the basis of the tender. And had the case rested there I gather that the Chief Baron would have left the case to the jury, and that the learned judges who subsequently had this litigation before them would have approved this course.

But another feature of the case was considered fatal to the plaintiffs' claim. The contract contained clauses, which I need not cite at length, to the effect that the contractors must not rely on any representation made in plans or elsewhere, but must ascertain and judge of the facts for themselves. And, therefore, the Chief Baron withdrew the case from the jury. As I understand it, the view he held, in substance confirmed by the Court of Appeal, was that the plaintiffs, so forewarned, had no right to rely on any representation, and could not be heard to say they were induced by statements on which by contract they were not to rely. Or, at all events, it was said that the defendants, being themselves innocent, are protected by such clauses against the consequence of contractors acting on false statements made by defendants' agents, however fraudulent those agents might be.

Now it seems clear that no one can escape liability for his own

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fraudulent statements by inserting in a contract a clause that the other party shall not rely upon them. I will not say that a man himself innocent may not under any circumstances, however peculiar, guard himself by apt and express clauses from liability for the fraud of his own agents. It suffices to say that in my opinion the clauses before us do not admit of such a construction. They contemplate honesty on both sides and protect only against honest mistakes. The principal and the agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge.

It is not necessary to say anything as to the Public Authorities Protection Act, for the King's Bench Division held that it did not apply to this case, and I am entirely of the same opinion.

I respectfully recommend to your Lordships that this case be sent for a new trial, and that the respondents pay the costs of this appeal and the costs in the Court of Appeal, the costs of the first trial to abide the event.

EARL OF HALSBURY. My Lords, I concur in thinking that in this case there must be a new trial, and for that reason I wish to say as little as possible on the merits of the case. The Chief Baron refused to leave the case to the jury upon grounds to be presently examined, but in the course of what I have to say I wish to point out at once that all I wish to affirm is that there was evidence produced by the plaintiff which he had a right to have submitted to the jury. I do not assume that the jury would have found that fraud had been committed by anyone. Still less do I propose myself to find fraud proved as a fact, but simply that it was a question which ought to have been submitted to the jury. The sole question here appears to me to be that question.

It was an ordinary action for fraud causing damage to the plaintiffs. Tenders were invited for a contract to execute certain work, and certain plans and specifications were held out to intending contractors as what I will at present call notices of what the work was intended to be. A contract was ultimately concluded upon the terms thus held out, and I may say at once that, apart from the question of fraud, there was nothing proved

which could have called for an answer from the defendants. It is not necessary to go far in reciting the questions of fact.

The Chief Baron pointed out with great clearness how the question of fact arises, and it turns upon the existence or non-existence of a certain wall. It is not denied that the wall was represented on the plan as going nine feet below the datum line, and the Chief Baron himself states that this statement was acted upon by the contractors so as to induce them to send in the tender at a less sum than they would otherwise have done for the execution of that contract. It is better, perhaps, to quote the Chief Baron's own words. His Lordship says: "In the result, then (and, as I have said, I have arrived at the conclusion with regret), I think that there was a statement contained in these plans which was, in fact, an incorrect statement; I think the result of that incorrect statement was that the plaintiffs here sent in the tender which was accepted and which was for a sum much less than that for which they would have tendered if they had known the truth. But I am obliged to hold upon this 43rd section, together with the 46th, 47th and 48th, which I won't occupy public time in reading, that, taken as a whole, or rather, taking the plans as controlled by the specification, they do not contain a representation intended to be acted upon, that this structure penetrated nine feet below ordnance datum." It will be observed that the Chief Baron affirms both propositions—that the statement was inaccurate in fact and that the tender was for a less sum than the contractor would otherwise have offered if he had known the truth.

The one point which led to the Chief Baron's judgment was, to use his own words, that the statement which he finds as a fact to be inaccurate does not contain a representation "intended to be acted on that the structure penetrated nine feet below datum line." With the sincere respect that I have for anything said by the Chief Baron, I cannot help saying that there is some confusion here. The words may be the subject of contract, and they may be so qualified or cut down by other words as to alter their primary meaning, but the intention with which words are used is the condition of mind of the person using them, and that is a question of fact to be ascertained by a jury. If one assumes that

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the statement is false, and that it has caused a person to act upon it to his prejudice, the question whether it was fraudulently made by the person who made it may, and ought to, be decided by a jury.

But the learned judge seems to think that the 43rd section of the contract removes it from being a question of fact for a jury, and that it becomes thereby a question of law for the judge. I must say, notwithstanding my great respect for the learned judge, I entirely differ from that view. The action is based on the allegation of fraud, and no subtilty of language, no craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury. I assume, of course, that there is evidence proper to be submitted to a jury, as in this case I think there was, and, if I rightly understand the Chief Baron, he would have submitted it to the jury but for the operation of that 43rd clause. I am wholly unable to understand why it was not proper to submit to the jury the question whether the answer given by the defendants' agents in respect of this very matter did or did not prove that the false statements contained in the plans were or were not fraudulently made, and if they were not intended to be acted on by the persons to whom they were made.

The witness Hellins, in the course of his evidence, stated that he and his assistants had prepared the plans and drawings, on behalf of the respondents, with the approval of Messrs. Harty and Chatterton, and in manner and design that had their consent and concurrence. The design of the plans was for the purpose of saving cost. He knew when preparing the plans that if a contractor had reason to believe that the wall was non-existing his tender would be substantially increased, and that he would practically have estimated for a coffer-dam costing 25,000*l.* About 100*l.* for a trial hole would have at least ascertained the existence of the foundations at any particular spot. The existence of the wall to a depth of nine feet was the backbone of the scheme. The dotted lines were intended to convey a doubt as to the existence of the wall. At question 1493 the witness stated: "I had every doubt as to the existence

of the wall. I had every doubt as to the exact depth, the exact shape, the exact character, and the exact construction." At question 1630 he stated that he intended to indicate the North Harbour wall as an existing wall, running down to a depth of nine feet below ordnance datum. At question 1691 he says that the plans were designed to shew a foundation of nine feet below ordnance datum, to be unknown and uncertain after that point. He further stated (questions 1687 and 1688) that the total of his information as to this wall is put forth in the letter of November 10, 1902, which contains every possible suggestion as to information. The operations therein mentioned took a week or ten days in April, 1895. Nothing had in fact been done with the direct object of ascertaining the facts; what witness now relied on was done for an express and different purpose of its own (question 1715).

The examination concluded with the following questions and answers:—1723: "Do I understand you seriously to admit that at the meeting of the three engineers it was deliberately arranged that these plans were to be put forward to indicate what you have told us on the information you have mentioned?"—"Certainly." 1724: "Am I right in saying your statement on November 10 is correct, that they were mainly influenced in that by the desire to have a cheap job?"—"Certainly." 1725: "Was the object of this to induce the contractor to moderate his estimate?"—"Certainly." 1726: "That is what it was intended for?"—"The design was intended for that." "And deliberately designed in that way?"—"Certainly deliberately designed." "By agreement and arrangement?"—"Certainly."

I do not understand the learned judge to express any doubt as to the liability of the principals for the fraud of their agent, if there was fraud: *Cornfoot* v. *Fowke*. (1) If it was supposed to decide that the principals and agent could be so divided in responsibility that—like the schoolboy's game of "I did not take it, I have not got it"—the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. One of the learned judges who decided the case of *Cornfoot* v. *Fowke* (1) explained it by saying that it

(1) (1840) 6 M. & W. 358.

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was only decided on a point of pleading, and another by saying that it was attempted to add a term to a written contract which was not in it. Whether these were satisfactory reasons I do not care to inquire. It is enough to say that the case is not law if it is supposed to affirm the proposition to which I have referred. Willes J. said that he would be very sorry to suppose that case ever decided anything but a point of pleading; and added in *Barwick* v. *English Joint Stock Bank* (1), in delivering the judgment of himself and Blackburn, Keating, Mellor, Montague Smith, and Lush JJ., that the division of opinion in *Udell* v. *Atherton* (2) arose, not so much upon "the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time (3)—but in applying that principle to the peculiar facts of the case, the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business as the manager of a bank is. But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

My Lords, we have of course nothing to do here with the question of damages, which could not be treated of till the questions now in debate have all been decided, but I do not think that the suggestion of one of the learned judges can be maintained that, because the work is to be measured and valued, there could be no damage sustained by the contractor if there were fraud. I think there is some misapprehension in the mind of the learned judge as to the application of the agreement as to measure and value. It is, however, enough to say that we have nothing to do here with the question of damages. The sole question before your Lordships is, Was the Chief Baron right in withholding the question from the jury?

I cannot conclude without saying that I desire to associate myself entirely with the observations which have been made by

(1) (1867) L. R. 2 Ex. 259, 262, 265. (2) (1861) 7 H. & N. 172.
(3) *Hern* v. *Nicholls*, (1708) 1 Salk. 289.

the Lord Chancellor, that it matters not in respect of principal and agent (who represent but one person) which of them possesses the guilty knowledge or which of them makes the incriminating statement. If between them the misrepresentation is made so as to induce the wrong, and thereby damages are caused, it matters not which is the person who makes the representation or which is the person who has the guilty knowledge.

I concur in the motion of the Lord Chancellor.

LORD ASHBOURNE. My Lords, I concur in the opinion of the Lord Chancellor that the appeal should be allowed, and as that involves the grant of a new trial I shall say as little as possible upon the merits of the case.

With the highest deference for the opinions of the Chief Baron and the learned judges of the Court of Appeal in Ireland, I am of opinion that the case should not have been withdrawn from the jury.

I think that there was evidence given at the trial upon which a jury might reasonably, if they thought proper, act in finding that the plaintiffs had suffered serious damage in consequence of the acts of the defendants or of their agents. The evidence went to indicate 1. that the plaintiffs were influenced in making the contract referred to in the case by statements for which the defendants were liable as to the existence of an old wall in an important position to the depth of nine feet; and 2. that those statements so made were false in fact, and were made by the engineers of the defendants recklessly and without any real belief in the existence of the facts represented. It may be inferred from the evidence of Mr. Hellins that the false representations were of the highest importance, were calculated to deceive, and were intended to be acted on.

But the decisions of the Chief Baron and of the learned judges in the Court of Appeal were not founded upon the opinion that there was no evidence fit to be submitted to the jury. They rested mainly upon the construction of the contract, whose 43rd clause provided that the contractors must not rely on any representations made in the plans, but must ascertain and judge of the facts themselves. The Chief Baron laid it down

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that the contractor was "not entitled, in point of law, to say he acted to the extent of a hair's breadth upon the statement contained in the plans." I am entirely unable to concur in this view, and, with much deference to the opinions of the Chief Baron and the learned judges of the Court of Appeal, I cannot think that in face of the evidence in the case this clause 43 could be regarded as establishing a defence. Such a clause might in some cases be part of a fraud, and might advance and disguise a fraud, and I cannot think that on the facts and circumstances of this case it can have such a wide and perilous application as was contended for. Such a clause may be appropriate and fairly apply to errors, inaccuracies, and mistakes, but not to cases like the present.

The respondents' counsel argued their case with great acuteness, but they could not overcome the broad contentions they had to face—that there was evidence for the jury, and nothing in the contract to prevent the jury fully considering that evidence.

I think the order suggested by the Lord Chancellor is correct.

Lord Macnaghten. My Lords, I entirely agree in the motion proposed.

Lord James of Hereford. My Lords, I fully concur in the view expressed, that it is expedient not to express any opinion upon the merits of this case which might influence a decision hereafter to be arrived at by another tribunal.

The question before your Lordships whether the Chief Baron rightly removed the case from the decision of the jury depends upon the answers to be given to one or two propositions.

Principally your Lordships have to determine whether evidence was given at the trial upon which a jury might reasonably act in finding that the plaintiffs had suffered damage in consequence of the deceit of the defendants or their agents.

With the most sincere respect for the judgment of the learned Chief Baron, I am of opinion that such evidence was given, and that the defendants were not relieved from the consequence of such deceit.

The defendants being desirous of carrying out some harbour

works, had to invite tenders for the necessary contracts. Certain information had to be afforded to intending tenderers. With this object engineers, nominated and employed by the corporation, prepared certain plans. As I understand, these plans were furnished by the engineers to the corporation and by the latter issued to applicants, of whom the plaintiffs' company was one. Upon those plans a very important wall was made to appear as existing nine feet below ordnance datum. It did not in fact run to such depth, and the defendants' engineers had no knowledge or reason to believe that it did. The representation appears to have been founded only on surmise. There is no doubt about the object of such false representations.

The evidence that was given in support of the view that the engineers had knowledge that they were making a false statement has already been quoted in the judgment of my noble and learned friend Lord Halsbury.

Now in the able arguments employed at your Lordships' Bar by counsel for the corporation it was not, in face of this evidence, contended that if the action had been brought against the engineers there would not have been evidence of deceit; but certain replies were made to the prima facie case against the defendants. In the first place, it was said that the plans were furnished by the engineers to the defendants, who are innocent of personal deceit. They passed the plans on, and so they innocently made the representation not knowing of its untruth. The engineers, who knew of the nature of the representations, made no communication to the tenderers. I cannot admit the soundness of this argument. The engineers were employed by the corporation as their agents to make the plans for the purpose of being communicated to the plaintiffs and others. In the course of this agency the alleged deceit was committed. Of course, the defendants did not personally test the accuracy of the plans, but when they passed them on they surely must bear the burthen of their agents' conduct, and cannot repudiate the wrongful representations upon which they to a certain extent invited the tenderers to rely.

In the Courts below this argument on behalf of the defendants was not accepted, and I concur in thinking that it cannot be maintained.

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But the learned Chief Baron, whilst accepting the view that the plaintiffs had produced prima facie evidence of deceit, apparently removed the case from the jury upon the ground that clause 43 of the specification protected the defendants from liability.

Now the learned Chief Baron in respect of this clause expressed the opinion that the contractor was not entitled in point of law to say he acted upon the statement contained in the plans. He was told to act upon his own judgment, and ought to have done so.

If this dictum be read as general in its terms, and so applied, it may be read as conferring considerable advantage upon the designers of fraud. At any rate, by inserting such a clause those who framed it would run a fair chance of the contractor saying, "I assume that those with whom I deal are honest and honourable men. I scout the idea of their being guilty of fraud. An inquiry testing the plan will be expensive and difficult, and so I will not make it." The protecting clause might be inserted fraudulently, with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a contract would be bad in law, but it is unnecessary in this case to determine whether special circumstances may not create an exception to that rule.

The defence raised under the Public Authorities Protection Act, 1893, was answered by the facts stated by the plaintiffs' counsel at the Bar as well as by the judgment of the Chief Baron.

I therefore think that the appeal must be allowed, and the case sent for a new trial, costs being allowed in accordance with the Lord Chancellor's judgment.

LORD ROBERTSON. My Lords, I concur in the judgment proposed.

Lord Atkinson. My Lords, I, like the noble and learned Lords who have preceded me, wish to guard myself against being supposed to express any opinion on the merits of this case or upon the weight or credibility of the evidence to the existence of which I shall have to refer. I think there was abundant evidence given on behalf of the plaintiffs proper to be submitted to the jury with a view to establish—first, that several of the maps and plans prepared by the defendants' engineers contained a representation that the North Harbour wall, the backbone of the scheme as it is styled, went down to a depth of nine feet below ordnance datum; secondly, that this representation as to a most material matter was false in fact; thirdly, that it was acted upon by the plaintiffs; fourthly, that it was made by these engineers recklessly, without any real belief in the existence of the fact represented.

One Spencer Harty was the chief engineer of the defendants, and under one of the provisions of the contract one Hellins was on December 11, 1899, duly appointed as Harty's representative, and put in charge of the works. These two gentlemen appear to have been associated in the preparation of the plans and specifications. I assume for the present, as was held by the Chief Baron and both the Irish Courts, that the defendants are responsible for the acts of these officers of theirs.

In this state of facts it was the province of the jury to determine with what intent the representation was made. They would, from the fact that the representation was false, have been entitled to draw the inference that the persons who made it intended that it should be acted upon. But in addition there is, in my opinion, in the testimony of Mr. Hellins substantive evidence to shew that these engineers intended that the representation should be acted upon. My noble and learned friend Lord Halsbury has already read the passage from Hellins' evidence (questions 1722 to 1726) which supports this view, and I need not repeat it.

It is clear from the portion of the evidence of this witness preceding the passage quoted, as well as from the contents of his letter of November 10, that he is in the latter passage referring to the North Harbour wall as shewn on the plans. He had at an

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earlier part of his examination, namely, question 1630, apparently abandoned the contention, not persisted in in the Irish Courts, or before your Lordships' House, that the dotted lines on the plans were used to indicate, not existing work below the surface, but work of the existence of which there was a doubt. And it is difficult, if not impossible, to see how the representation that this covered work existed could induce the contractor to moderate his estimate unless he trusted in that representation and acted upon it. As I understand the Chief Baron's decision, he withdrew from the jury the questions which it would prima facie have been the right of the plaintiffs to have left to them—not because there was not evidence upon each proper for their consideration, but because he thought the plaintiffs had by their contract deprived themselves of the right to have the question of the intention with which the representation was made submitted to the jury at all, had in effect contracted that they would not allege that any representation such as that in fact made had been made with the intent that it should be acted upon, or that it had in fact been acted upon.

In commenting on clause 43 he expresses himself as follows: "My clear opinion is that, with that statement in the specification, upon which the contractor was to make his tender, he is not entitled, in point of law, to say, I acted to the extent of a hair's breadth upon the statement contained in these plans. He was told he should act upon his own judgment, and satisfy himself as to the dimensions, levels, character and nature of the existing works. And, I regret to say, that if he has not done that, but on the contrary has acted upon their statement, he is not entitled to recover upon that as a representation made with intent to be acted upon."

The rule of law thus laid down by the Chief Baron would apply to any action for deceit founded upon the plans and specifications. He makes no distinction between conscious and unconscious fraud, such as is made by the Court of Appeal—a distinction which, if sound, would appear to me to amount to this, that the contractor should be held to have a cause of action for deceit if he was deceived by a deliberate lie, but no cause of action if he was deceived by a false and reckless statement not really believed

in by those who made it, though in law equally fraudulent, and equally valid as the ground of such an action. With all respect to the learned judges presiding in the Court of Appeal, I think this distinction unsound, and, as I understood, it was not insisted upon before your Lordships by the defendants' counsel in their able arguments. It would appear to me that a clause such as art. 43, deliberately introduced into a contract by a party to the contract, designed beforehand to save him from all liability for a false representation made recklessly and without any real belief in its truth, is as much "conceived in fraud" and as much "part of the fraud" as if the representation had been false to the knowledge of the person who made it, because, to use Lord Bramwell's words in *Smith* v. *Chadwick* (1), "An untrue statement as to the truth or falsity of which the man who makes it has no belief is fraudulent, for, in making it, he affirms he believes it, which is false." If, therefore, the *direction* given to the jury is to be upheld on the grounds upon which it was purported to be based, it must, in my opinion, be because these several articles of the contract, on their true construction, are to be held to embody a contract by the plaintiffs that they in effect are not, under any circumstances, to have a remedy by action for deceit for any fraud which may be practised upon them by the defendants or by those acting on their behalf in the nature of a false representation, that is a contract to submit to a fraud.

As at present advised I am inclined to think, on the authority of *Tullis* v. *Jacson* (2) and *Brownlie* v. *Campbell* (3), that such a contract would be illegal in point of law. And, with the most profound respect for the Chief Baron, I do not think that the articles of the contract relied upon can, on their true construction, be held to have had fraud, whether conscious or unconscious, within their purview or contemplation, or to apply at all to such a case of fraud as the present is alleged to be. They were, I think, intended to apply, and do apply, to inaccuracies, errors, and mistakes, or matters of that sort, but not to fraud, whether of principal or agent or of both combined.

(1) (1884) 9 App. Cas. 187, at p. 203. (2) [1892] 3 Ch. 441.
(3) (1880) 5 App. Cas. 925, 937, 956.

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I observe that the Chief Baron refers to *Thorn* v. *Mayor and Commonalty of London* (1) as an authority for holding, to use his own words, "that the object and effect of this clause 43 is to render the contractor a person who must depend upon his own knowledge, acquired by his own engineers"; but the action in that case was an action for breach of warranty, not for deceit. The contention of the plaintiff there was that, if a man "stipulates that work shall be done in a certain manner, he undertakes that it can be done in that manner," and the decision in effect was that no such undertaking is given by a stipulation of this kind. If the present action were founded on a warranty, expressed or implied, that the information given by the plans was accurate, or the works feasible, it may well be that art. 43 would furnish a complete answer to the plaintiffs' claim, but that is an entirely different matter.

As I understand the argument addressed to your Lordships by the counsel for the defendants, they rested their case on grounds totally different from those on which the decision of the Court of Appeal was based. They did not rely upon the distinction between conscious and unconscious fraud at all, but contended that on a true construction of the contract, incorporating as it does the plans and specifications, it was plain that the only representations made to the plaintiffs were made by the defendants themselves, not by their engineers; that it was admitted they themselves gave to the plaintiffs such information as they had; that they did so innocently believing it to be true; that they did not warrant this information to be accurate; that they were therefore not responsible for the fraud of their engineers, if fraud there was; and that it was perfectly legitimate for them to protect themselves, as they contended that they had protected themselves, by this art. 43 and the other articles referred to, and that they were therefore in point of law entitled to the direction their counsel had asked for and obtained.

I do not think that this contention is sound. Indeed, Mr. Ronan was obliged to admit that if the defendants had authorized their engineers to communicate directly to the contractor the plans, and therefore the representation appearing on

(1) (1876) 1 App. Cas. 120.

the face of them, his clients would, within the authority of *Barwick* v. *English Joint Stock Bank* (1) and the cases following it, have been responsible for the fraud of the engineers thus made their agents; but that, inasmuch as the plans had been supplied to the contractor by the defendants themselves, the engineers were not their agents to make any communications to the plaintiffs concerning them. But by the terms of the contract the engineers are expressly named as the persons to prepare the plans for the "use" of the contractor. The tender was to be based upon these plans. The work was to be carried out in accordance with them. The engineers were therefore, by the express terms of the contract, constituted the agents of the defendants to draw up the plans which must of necessity be communicated to or supplied to the contractor. Both the engineers and the defendants must, I think, be held to have intended that the plans should be so communicated or supplied. The engineers were admittedly acting within the scope of their authority in preparing the plans and forwarding them to the defendants or to their committee or their town clerk for transmission to the contractor. The committee was simply the medium through which the plans were to be transmitted; they had no power to alter them in any way. And it would appear to me that the representations contained in these plans might under these circumstances be held, as a matter of fact, to have been made by the engineers to the contractors as truly as if the documents had been sent by the engineers to them through the post, or by the hand of a messenger. I think, therefore, that the defendants are responsible for the fraud of their engineers in framing the plans, if fraud there were.

The only other point relied upon by the defendants on this appeal was that they were within the protection of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), the fraud for which they were sued having been an act done by them "in pursuance or execution of any public duty or authority"; and that the action which was only instituted on July 30, 1904, over four years after the false representation had been made, and over three years after the damage had commenced to accrue, was late.

(1) L. R. 2 Ex. 259.

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The answer to that, upon the facts, is that where, as in this case, the damage is continuing damage, the period of six months does not, under the express words of the statute, commence to run until after the damage has ceased. Here the damage continued till August 27, 1903, and on the 2nd December previous it was agreed between the plaintiffs and the defendants that the claims of the former in respect of the wrong now sued for should stand over till after the completion of their contract, an event which did not take place till the month of June, 1904.

The Chief Baron decided on the authority of *Sharpington* v. *Fulham Guardians* (1) that the making of a false representation by which a person was induced to enter into a private contract with a public authority for the construction even of works authorized by statute could not be held to be an act done by that authority "in pursuance or execution of a public duty," and that therefore the statute did not apply. The judges of the King's Bench Division concurred, and the question was not dealt with by the Court of Appeal. Were it necessary to decide the point now, I should for myself be ready to concur in opinion with the Chief Baron, but, owing to the existence of the arrangement which I have mentioned, I think it is not necessary to decide it. On the whole I am of opinion that the decision of the Court of Appeal in Ireland was wrong and should be reversed and the judgment of the King's Bench Division affirmed, and that this appeal should be allowed and the order as to costs suggested by my noble friend on the woolsack made.

LORD COLLINS. My Lords, I agree.

Order of the Court of Appeal (Ireland) reversed, and judgment of the King's Bench Division (Ireland) restored, with costs here and in the Court of Appeal: Cause remitted to the King's Bench Division (Ireland).

Lords' Journals, May 30, 1907.

Solicitors: *Le Brasseur & Oakley, for Casey & Clay, Dublin; R. Leslie S. Badham, for Ignatius John Rice, City Hall, Dublin.*

(1) [1904] 2 Ch. 449.

[HOUSE OF LORDS.]

ATTORNEY-GENERAL FOR IRELAND . . APPELLANT; AND VANDELEUR . . . . . RESPONDENT.

H. L. (I.) 1907 July 15.

Foreshore—Patent—Charter—User—Weight of Evidence.

The property in the Merchants' Quay, in the creek of Kilrush, built in 1848 upon the foreshore by the respondent's predecessor in title, having been claimed by the respondent and also by the Crown :—

Held that, without deciding any questions of law, the weight of the evidence derived from user and documents shewed conclusively as a matter of fact that the quay was the property of the respondent.

Decisions of the Master of the Rolls and the Court of Appeal in Ireland, [1905] 1 I. R. 483, 509, affirmed.

THE circumstances of this appeal are stated in the judgment of Lord Loreburn L.C.

June 5, 6, 10. *Cherry* (Attorney-General for Ireland) and *Barry* (Solicitor-General for Ireland) (with them *Henry*, *K.C.*, and *Walker*, *K.C.*, both of the Irish Bar), for the appellant.

Sir R. B. Finlay, *K.C.*, and *M. J. Bourke*, *K.C.*, of the Irish Bar (with them *E. J. Phelps*, of the Irish Bar), for the respondent.

The House took time for consideration.

July 15. LORD LOREBURN L.C. My Lords, in this appeal the sole question is whether or not Merchants' Quay, at Kilrush, belongs to Mr. Vandeleur. The Master of the Rolls and the Court of Appeal in Ireland have decided in Mr. Vandeleur's favour, and I agree in that conclusion.

No useful purpose would be served by a minute examination of the evidence given on either side, or by a scrutiny into the points of mixed law and fact which have arisen in regard to its admissibility and in regard to the construction of various documents. These points are numerous. But, in my view, this case must be determined on a broad view, and the subordinate details,

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which fill so large a part of the materials laid before this House, have little weight with me.

Mr. Vandeleur's predecessors in title constructed this quay between fifty and sixty years ago at their own expense on certain foreshore. Since then they and he have continuously and as of right maintained the quay, appointed persons to manage it, and collected tolls for its use. In short, they exercised every right of ownership in regard to it openly till the recent dispute arose.

When asked whence they derive their title, of which the acts referred to are such cogent evidence, the Vandeleurs point to an undisputed charter of 1621, which grants many lands and manors to their predecessors in title. Admittedly the land adjacent to this foreshore was included in the grant and has been held under it ever since. Was the foreshore itself included? The charter does not in terms grant the foreshore, but the language used may or may not include it. So the doubt whether it does or does not include it may legitimately be solved by reference to the actual user, and indeed cannot be solved otherwise. User so continuous, so notorious, and for so long a time as we have seen proved in the present case, surely forms an immensely strong foundation for the view that this charter did in fact include this foreshore. No doubt it may be possible to displace this presumption or to counteract it. The Attorney-General has attempted this, but without success; and I will do no more than advert to his main contentions.

In the first place he shewed that when this quay was built, some fifty or sixty years ago, the work was at first undertaken by the Crown under an Act of Parliament which provided that such works, when constructed out of public money, were to vest in the Crown. And accordingly, says the Attorney-General, this quay belongs to the Crown by statute, no matter who owned the foreshore. The answer is that after some money had been spent by the Crown on this work the contract was cancelled, and Mr. Vandeleur's predecessor in title repaid to the Crown all that had been so spent. I have no doubt that the effect of this transaction was to annul what had been done, and to prevent the work from vesting in the Crown under this Act of Parliament. And the transaction, taken as a whole, indicates that the Crown

had no title, rather than that the Vandeleurs had no title, to this foreshore.

It was next urged that so late as 1891 Mr. Vandeleur submitted to a claim of right adverse to his own title, when the South Clare Railway Company, in defiance of him, laid their rails on part of this quay, and have since run their trains along it. That is true. Mr. Vandeleur did submit, after a curious attempt to turn off the company by violence, as though there were no law in the land; and his submission is a piece of evidence against his present claim. When he declined to encounter so great a litigation for so small a stake perhaps he exhibited proof rather of his own good sense than of any infirmity in his title. Still, this was evidence against him; but it is overborne by the other evidence.

The remaining argument on behalf of the Crown took this form. Under the charter of 1621 the king granted the manor of Kilrush, also some lands, which can still be by name identified as lands near to the town; and, after making these grants, purported to enlarge the manor so as to include all the lands subjects of the grant. What the old manor of Kilrush was—if, indeed, there was any—we know not. What were the borders of the new manor created—if it was created—by the charter we know not. All we know is that the new manor, which this charter claimed to create, was to include a quantity of lands still capable of identification. How much of these lands included foreshore and how much did not include foreshore can only be ascertained by proof of user. For until 1621, at all events, they did not constitute one manor at all, and belonged to no unit of territory, if such a phrase may be used.

It was therefore in each case a question of parcels, whether the particular land included foreshore or not. In these circumstances the Attorney-General attempts to prove that the Crown exercised rights of ownership over the foreshore of some of these lands. Then he assumes—for he cannot prove—that those pieces of foreshore formed part of one and the same unit of territory or manor; and infers that because some of the foreshore in his unit belonged to the Crown, therefore all of it belonged to the Crown; there being, he urges, no room for diversity in this

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respect between lands which ex hypothesi belonged to the same unit. An easy conclusion followed, that as the quay in question was situate on foreshore within this imaginary unit the foreshore must belong to the Crown. I need not point out the fallacy of this argument, for it lies on the surface. We have no right to assume either that there was such a unit or that all the adjoining foreshore belonged to it. All we can conclude is that there was an aggregation of lands, some of which may and some may not have included some foreshore.

An excellent practical commentary on the danger of such reasoning may be found in the fact that other pieces of foreshore within the same imaginary unit have certainly been treated both by the Vandeleurs and by the Crown as belonging to the former. In a word, no conclusions of value to this present controversy can be derived from the dealings of either party to this action with portions of the foreshore other than the actual quay which is the subject of your Lordships' decision to-day.

These are the only arguments which I think require to be noticed, and they in no way affect the main conclusion. I respectfully advise your Lordships to dismiss this appeal, and in so doing I desire to state as pointedly as I can that my opinion affects the Merchants' Quay alone and no other piece of land.

LORD JAMES OF HEREFORD. My Lords, I concur in the judgment delivered by the Lord Chancellor, and I agree with the reasons which he has given for that judgment.

I think the proper view to take of the charter of 1621 is that it is left in doubt by the section of that charter whether the foreshore was or was not granted by the Crown. But I concur in the view which the Lord Chancellor has expressed, that if you take the evidence as a whole, and compare that given on behalf of either party, the appellant and the respondent, the weight of evidence shews a great preponderance in favour of the respondent's claim.

LORD COLLINS. My Lords, I am of the same opinion.

LORD LOREBURN L.C. My noble and learned friend Lord

Robertson, who is absent, is also of opinion that the appeal ought to be dismissed.

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Order of the Court of Appeal (Ireland) affirmed, and appeal dismissed.

Lords' Journals, July 15, 1907.

Solicitors: *Solicitor to the Board of Trade; Hallowes & Hamilton, Dublin; Hopgood & Dowson, for John Cullinan, Ennis.*

[HOUSE OF LORDS.]

BOARD OF TRADE . . . . . Appellants;

AND

BAXTER AND ANOTHER . . . . . Respondents.

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1907
July 29.

THE SCARSDALE.

Ship—Admiralty—Agreement for Voyage—End of Voyage—Election by Master—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 114, 115.

A fireman signed an agreement for a voyage, not exceeding one year, from Cardiff to any ports within certain limits, and to end at such port as might be required by the master. The ship left Cardiff, loaded a cargo in the Black Sea, and went to Southampton, where she discharged the whole of her cargo. The fireman then claimed his discharge and his wages. The master required him to go on to Cardiff:—

Held that, upon the true construction of the agreement, the voyage was the voyage of the ship, not of the cargo; that as a matter of fact the voyage did not end at Southampton, and that the fireman was bound to go on to Cardiff.

Decision of the Court of Appeal, [1906] P. 103, affirmed.

The facts in this case are stated in the judgment of Lord Loreburn L.C. Bargrave Deane J. held that by accepting a charter for a cargo from the Black Sea to Southampton the master exercised his power to end the voyage at Southampton as his "final port of discharge," making it thereby his "final port of destination," and, having so exercised his power, had no right to require the fireman to proceed further, and that the fireman was entitled to his discharge and wages at Southampton, with costs.

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This decision was reversed by the Court of Appeal (Vaughan Williams, Stirling, and Fletcher Moulton, L.JJ.), who condemned the master and the Board of Trade in costs. Hence this appeal, in which the fireman and the master were respondents.

May 16, 28. *Sir W. S. Robson, S.-G.*, and *Sir Robert Finlay, K.C.* (*Sir J. Lawson Walton, A.-G.*, and *Rowlatt* with them), for the appellants. The voyage was at an end when the vessel reached Southampton, where her cargo was discharged. If the voyage was not at an end the whole agreement was invalid. By s. 113, sub-s. 2, of the Merchant Shipping Act, 1894, there must be an agreement "in accordance with this Act." The limits of agreements are specified in s. 116, sub-s. 4. They are not to extend beyond June 30 or December 31, "or the first arrival of the ship at her final port of destination in the United Kingdom after that date or the discharge of cargo consequent on that arrival." There are three alternatives, the latest of which is the discharge of cargo. There is no definition of the word "voyage" in the Act. But Lord Stowell's decisions in *The Minerva* (1) and *The George Home* (2), and Dr. Lushington's in *The Westmorland* (3), give virtually the same criteria of the end of a voyage. The words in other sections of the Act are—"final port of destination": s. 118, sub-s. 3, s. 242, sub-s. 1, s. 253, sub-s. 2 (*a*); "final port of discharge": s. 239, sub-s. 4, s. 241, sub-s. 2. These expressions all point to the discharge of cargo as the final act of a voyage; and the earlier Merchant Shipping Acts of 1729, 1796, and 1835 all point to the same conclusion. Moreover, all the statutes and the decisions require that the voyage shall end in some port of the United Kingdom. In *The Minerva* (1) the words "or elsewhere" were added, but rejected as of no avail by Lord Stowell. This view is supported by s. 118, sub-s. 3, which requires the delivery of the agreement to the superintendent within forty-eight hours of arrival at the "final port of destination," or "the discharge of the crew, whichever first happens." The crew are entitled to be discharged on arrival at a home port. The only kinds of agreement are

(1) (1825) 1 Hagg. Adm. 347. (2) (1825) 1 Hagg. Adm. 370.
(3) (1841) 1 W. Rob. 216.

that which is specified in s. 116, sub-s. 4, and running agreements. In the present case the engagement was of the former class, but the Court of Appeal have in effect construed it as a running agreement. Some discretion, it is true, is left to the master. He might have chosen any of the home ports mentioned in the agreement for the discharge of cargo. But in requiring the men to go to Cardiff he was attempting to convert one voyage into a succession of voyages. The Act was intended for the protection of seamen against arbitrary conduct on the master's part, and has therefore fixed a limit to the duration of a voyage, which the master illegally attempted to transgress.

J. A. Hamilton, K.C. (*Lewis Noad* with him), for the respondent the master. The agreement was made in the form approved by the Board of Trade and in accordance with the requirements of the Merchant Shipping Act. The question is whether under s. 164 the respondent Baxter was entitled to his discharge and to sue for his wages. He was only entitled to wages if he could claim his discharge. In s. 114, sub-s. 2 (*a*), the agreement must be for a "voyage or engagement"; the two words are advisedly used, and are exclusive of each other. Thus the question is whether the "engagement" ended at Southampton. Now the agreement expressly states that the voyage is "to end at such port in the United Kingdom . . . . as may be required by the master." There is no word of "port of discharge." The appellants' contention takes away the master's discretion. There may be one voyage and several cargoes, and all that the Act requires in s. 114, sub-s. 2 (*a*) is that either the duration *or* the geographical limits of the "voyage or engagement" shall be specified. Both time and space are specified in the contract, and the conditions with respect to both have been fulfilled. One round voyage may include several voyages; there is no definition of "voyage." Indeed, the very words "to ports in any rotation" suggest the taking in and discharge of several cargoes. The word "engagement" in s. 134, sub-s. (*a*), which deals with the payment of the seaman, applies to all contracts of service. Any contract is valid so long as it complies with the Act. There is no need to discharge in a home port. The contract provides for discharge in a home port or in the

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"continent of Europe." The Act itself, s. 186, sub-s. 1 (*b*), provides for the case of the end of service "at any port out of His Majesty's dominions." Thus the mischief suggested by the appellants has been deliberately left unredressed by the Legislature. The end of the voyage is defined, not by the discharge of cargo, but by the delivery of the certificate to the master under s. 118, sub-s. 1, or the delivery of the agreement to the superintendent: s. 118, sub-s 3. The relations between seamen and masters or owners are now exclusively regulated by the statute, and the old decisions which have been cited have no application. The old jurisdiction of the Admiralty Court was largely equitable, and proceeded on the assumption—reasonable enough in those days—that seafaring men, who were mostly illiterate, required incessant protection. The only remnant of this jurisdiction is in s. 168, empowering the Court, for due cause shewn, to rescind a contract of service or apprenticeship.

Sir Robert Finlay, K.C., in reply.

The House took time for consideration.

July 29. LORD LOREBURN L.C. My Lords, the question in this case is whether or not Charles Baxter, a fireman who served on the steamship *Scarsdale* is entitled to the sum of 4*l.* 3*s.* 9*d.*, being the balance of wages, and also a sum of 2*l.* for compensation.

A summons was taken out under s. 164 of the Merchant Shipping Act, 1894. The magistrates found the facts, and referred the case to the Admiralty Court under s. 165, sub-s. 3, of the Act.

Baxter was engaged in August, 1904 on the following terms: That he was to serve "on a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees north latitude, and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation and to end at such port in the United Kingdom or continent of Europe (within home-trading limits) as may be required by the master."

The *Scarsdale* proceeded to Malta, thence to the Black Sea, where she took in grain, and thence to Southampton, where she arrived

on September 28. The ship there discharged the whole of her cargo, and Baxter claimed his discharge. The master of the *Scarsdale* told him he would have to go on to Cardiff. He said nothing further, and it is obviously consistent with the master's attitude at the time, as it is with the argument urged before your Lordships, that the real claim on behalf of the shipowners was that Baxter should serve in a succession of voyages, not exceeding in all one year's duration, until the master should think fit to fix upon a particular port as the end of the service.

Bargrave Deane J. decided in favour of Baxter, but the Court of Appeal reversed his decree, and your Lordships now have to decide the question finally.

I ask myself first, What is the meaning of this agreement? It is an agreement for one voyage, not for two or more voyages, and it is an agreement for one year and no longer. If, therefore, any one voyage comes to an end before the expiration of the year, the service is also ended. It is true that the master may choose at what port in the United Kingdom or within home trading limits the voyage is to end, but that does not mean that he can prevent a voyage from ending when in fact it has ended. It means that he is the person who has to fix upon the port where the voyage is to end, but if he fixes upon a port where in fact the voyage does end, although he may not intend that the voyage shall end there, the voyage is none the less ended at that port.

I turn now to the Merchant Shipping Act, 1894, and consider the meaning of its provisions in regard to voyages. It seems to me that under the Act a seaman may agree for a voyage no matter how long it may last, in point of time, provided it is in fact one voyage, and the requirements of the Act are complied with. A seaman may also agree for two or more voyages (called a running agreement), provided that the service shall in that case end within a short fixed period, namely, June 30 or December 31 next following, "or the first arrival of the ship at her port of destination in the United Kingdom after that date, or the discharge of cargo consequent on that arrival."

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Accordingly, it will be observed that the nature of any authorized agreement hinges upon the meaning of the word "voyage," and yet the Act gives no definition of that word, because it does not admit of definition. There is an indication and no more. The Legislature apparently attaches importance to the arrival of a ship at her port of destination in the United Kingdom and the discharge of her cargo there.

It must in each case be a question of fact what is a voyage, and in ascertaining what it is a Court may regard the following among other considerations: The duration of the adventure in point of time and its unity; its geographical limits and direction; whether new cargoes are shipped, or new charters made, or ports visited in orderly succession; and in particular whether there has been a sailing from, and afterwards a return to, the United Kingdom.

Coming back to the United Kingdom in the case of a British ship is not quite the same thing as returning to another port. It is in the nature of a home-coming, and where followed by a complete discharge of cargo it does in a considerable degree denote the termination of a voyage. If, looking at what is done as a matter of business, the Court perceives that there is a series of several adventures, and not one adventure divided into several stages, then it is not one voyage, but two or more voyages, and the agreement must be a running agreement with its limitations of time attached. It is not lawful to escape the limitations attaching to a running agreement by calling something a voyage which in point of fact is not a voyage.

Looking at the facts here, there is ground for saying that the arrival at Southampton ended a voyage, and, if a voyage, then the voyage for which this man engaged, seeing that he engaged only for one. If the master designated Cardiff as the end of the voyage, he was entitled to do this in order that he might take his ship from Southampton to Cardiff, which was the port where the crew were engaged. Whether he did so or not is a question of fact upon which I am not prepared to dissent. I think it is clear the master could not under these articles have required the men to continue their service after arrival at

Cardiff. That is what the respondent contended for, though it was not necessary for his case.

I am of opinion that the judgment of the Court of Appeal should be affirmed, and I move your Lordships accordingly.

LORD JAMES OF HEREFORD. My Lords, the question raised and now to be determined is, Did the voyage under the circumstances terminate at Southampton, or was the master within his rights in requiring it to be continued to Cardiff?

The contention that the voyage ended at Southampton seems to be based upon the view that the fact of the cargo on board the *Scarsdale* being wholly discharged at Southampton necessarily brought the voyage to an end. In my opinion this contention is untenable.

Looking at the terms of the articles, the voyage is to terminate at such port within the United Kingdom as the master may require. Nothing is said about the cargo or its delivery. The voyage is that of the ship, and not of the cargo.

No doubt the Act of 1894 contains provisions framed for the purpose of protecting seamen when entering into these shipping contracts, and I think your Lordships ought zealously to see that those protections are not evaded. In these articles the limit of the voyage to one year is a substantial protection.

The counsel for the Board of Trade argued that, whilst the vessel might load at several different foreign ports, it could not, after delivery of a cargo within home trade limits, continue the voyage. But I see nothing in the agreement to support this contention. It seems strange and artificial, and cannot be supported unless, as Sir Robert Finlay admitted, words by implication were read into the articles. I gather that this admission was made from the judgment of Fletcher Moulton L.J.

I cannot see any hardship or injustice that can arise from accepting the agreement in its natural sense. It was urged that if the respondents' view were correct, a series of voyages might be undertaken whilst only one was contemplated. Your Lordships need not, when determining this case, enter upon such consideration. It is enough to deal with the existing facts. The captain, after delivery of the cargo, desired to intimate that

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the end of the voyage was Cardiff. No further venture was undertaken. I desire to add that the question involved in this case must be regarded as one of fact rather than law.

Very good reasons might exist for wishing to bring the vessel home to the port from which it commenced the voyage, and great inconvenience might arise from having to secure a fresh crew at Southampton. It was said that runners could always be obtained to work a vessel. To employ such crews on board a steamship might be inconvenient, if not hazardous.

I therefore think that the judgment of the Court of Appeal is correct, and should be affirmed.

LORD ATKINSON. My Lords, substantially I concur in the result that has been arrived at.

It was contended in the argument by counsel for the Board of Trade that the Merchant Shipping Act, 1894, only permitted two forms of agreement, namely, agreements for a voyage and running agreements. I think the provisions of the 127th section make that absolutely clear, and that they were right in their contention.

It is impossible to define affirmatively what a voyage is. That, I think, is a question that must depend in each case upon the particular facts of that case, but it may be possible to approach a negative definition of it by saying that it must at all events be one enterprise. I think it would not have been permissible for the master of the ship, under articles such as these, to have left a home port, to have traded from a foreign port to a foreign port, to have returned to a home port and there discharged his cargo and started afresh upon a new journey to some other foreign port. I think that would have been an abuse of the powers conferred upon him to designate the port at which the voyage was to end. Neither do I think it would have been competent for him under these articles to have added, as it is said, a home coast trading supplement to the foreign voyage.

I am far from saying that the final port of discharge is necessarily the end of the voyage, or that it would not have been competent for the master under these articles to have designated the port of Cardiff as the end of the voyage. My

difficulty in this case—for I have a difficulty—arises from this, that I am entirely unable to find in the evidence of the captain any indication that he named the port of Cardiff as the termination of the voyage, or any indication of the purposes for which he desired to go to the port of Cardiff. It would, in my view, have been absolutely consistent with his evidence that he designed after his arrival at Cardiff to start upon a new foreign voyage or a coast trade cruise. I own that the inclination of my opinion would have been that, in the absence of all evidence of this character, the port to which he took a cargo, to which he navigated the ship on a voyage upon which he required the crew to serve, and at which he finally discharged his cargo, would prima facie be taken to be the port which he designated as that at which the voyage should end. But that is a matter of fact upon which different views may be entertained, and I am not so confident in my own opinion as to induce me to differ from my colleagues.

Lord Collins. My Lords, the agreement with the plaintiff in this case, which was in a form approved by the Board of Trade, was for a voyage which was to end at such port in the United Kingdom or continent of Europe (within home trade limits) as might be required by the master.

Now, it is not disputed that the master did, in point of fact, require the voyage of the ship to end elsewhere than at Southampton, the port where the plaintiff claimed his wages on the footing that the voyage had ended there. Unless, therefore, he can get rid of the express provision of the agreement making the requirement of the master a condition precedent to the end of the voyage, he was never in a position to demand his wages, and the decision of the Court of Appeal is right. But the point made for the appellants is that, inasmuch as Southampton, where the ship had arrived, was the port of final discharge of the cargo, the provision in the agreement enabling the master to fix another destination for the ship and crew as the end of the voyage is illegal, and must either be struck out of the agreement as separable, leaving the rest of the agreement standing, or that the whole agreement must be treated as illegal, leaving a claim to the plaintiff as on a quantum meruit for work done.

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The facts which raise the question are so very short, that to avoid any misapprehension as to what is the point of law involved in this appeal I will read them as they are stated on the record. Patrick Murphy, a seaman, says: "I signed on board the British ship *Scarsdale* at Cardiff on August 5, 1904, as a fireman. I proceeded in that vessel to Malta, then to the Black Sea, where we took in grain, and then to Southampton, where we arrived on September 28 last. The ship there discharged the whole of her cargo. Defendant is the master of the said ship. The sum of 3*l*. 19*s*. is due to me as wages as fireman on board the said ship. . . . . At Southampton I claimed my discharge. On the day the ship arrived at Southampton I went to the captain. I said to him, 'I would like my discharge.' He said, 'Go and see the shipping master.' The reason I asked for my discharge was because the cargo was discharged, and I thought that Southampton was the final port of discharge, and that I had completed my agreement under the articles. Defendant said, 'The agreement is not at an end.' I went to the shipping master and afterwards took out this." Cross-examined: "The defendant would not give me my discharge. He told me I should have to go on to Cardiff." That is the plaintiff's story in examination and cross-examination.

Then comes the master, who says: "Southampton was the final port of discharge for the cargo."

The justices then formulate the issue referred to the Admiralty Court—it is the only one that arises for discussion in this case: "As both sides admitted the question was a most important matter in the interests of the shipping world, we the undersigned justices decided to refer the claim to the Admiralty Division of the High Court (such claim depending upon whether the plaintiff was entitled to his discharge under the said articles at Southampton or Cardiff) under s. 165, sub-s. 3, of the Merchant Shipping Act, 1894, and the said claim is referred accordingly." The question, therefore, is as between Southampton and Cardiff, not with a view to any possible destination of the ship after Cardiff; that is out of the question on the facts. This is the issue, accordingly, with which Bargrave Deane J. purported to deal. The Court of Appeal properly addressed themselves to the same issue;

and this case must, I think, be dealt with on the footing that if the voyage was not ended at Southampton it was ended at Cardiff.

Bargrave Deane J. says: "Upon this statement of facts the question of law arose, whether the voyage and agreement of the plaintiff with the master terminated at Southampton or Cardiff." And in deciding the case he says: "I find that it is an agreement within the meaning of s. 114, sub-s. 2 (*a*), and s. 115, sub-s. 5, and that the master, by accepting a charter for a cargo from the Black Sea to Southampton, exercised his power to end the voyage at Southampton, a port in the United Kingdom, as his 'final port of discharge,' making it thereby his 'final port of destination;' that, having so exercised his power, he had no right to require the plaintiff to proceed further with the ship; and that the plaintiff was entitled to his discharge and his wages at Southampton."

The root of the matter, therefore, would seem to be whether it was illegal to leave it in the discretion of the master to name within the agreed limits the port where the voyage (of the ship) was to end. It is obvious that there might be excellent business reasons which might make it desirable for the owners to secure the services of the crew to take the ship on to another port than that at which she had delivered her last cargo. For instance, she might have delivered her last cargo at a Continental port within home trade limits, and the owners might well desire to have her back in the United Kingdom, and to have the services of the same crew to take her back instead of trusting to haphazard selection at the port where she happened to have delivered her cargo. What could be more prima facie reasonable, therefore, than a stipulation securing the possibility of effecting this purpose? But on the argument for the appellants such a stipulation would be illegal, and the voyage would be deemed to have ended at the Continental port. I cannot find any foundation in the Merchant Shipping Act for such a contention. The policy of that Act, as pointed out by Mr. Hamilton, seems to be to frame certain carefully considered rules to safeguard the rights of sailors in their agreements, but within those rules to leave them freedom of contract, ample security being taken that the terms of their contracts shall be fully

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explained to them. Sect. 114 of the Merchant Shipping Act, 1894, which is the most material provision, by clause 1 provides "that an agreement with the crew shall be in a form approved by the Board of Trade"; and by clause 2, "The agreement with the crew shall contain as terms thereof the following particulars: (*a*) Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engagement is not to extend."

There is no provision more stringent than this, and, unless the agreement in question is prohibited by this, it cannot be impeached. Now it is not disputed that the adventure contemplated by this agreement is properly described as a voyage (see per Bargrave Deane J., Vaughan Williams and Stirling L.JJ.), though it covers many possible distinct subordinate adventures involving the discharging and receiving of cargoes at many different points "trading in any rotation." The maximum period, viz., one year, is named, and the places or parts of the world to which the voyage or engagement is not to extend are defined. Nor was exception taken to the provision giving discretion to the master to name the port within home trade limits at which the voyage, treating that word as concerned with the transit and delivery of the cargo only, was to end. How, then, was the suggested element of illegality introduced into the discussion? With the greatest deference to the eminent counsel who argued for the appellants, be it said, simply by begging the question. On the assumption that the voyage ended at the port where the last cargo was delivered, a provision that the master might order the ship on to a fresh destination might involve the commencement of a new voyage and so sin against the statute; but if the voyage did not end till the ship had reached her destination at the home port required by the master, there is nothing upon which to found an implication of illegality. I agree with the contention of Mr. Hamilton, which was adopted by the Court of Appeal, that the voyage contemplated for the cargo need not be co-extensive with that contemplated for the ship, though it very often is. I think it is very much to be deprecated that the Court should be subtle to

find implications of illegality having the effect of hampering freedom of contract in business matters where no express prohibition can be found.

In my opinion the contention of the respondents involves no illegality, and the voyage did not end at Southampton. I think the result of the appellants' contention would be most unreasonable, and such as I cannot suppose the Legislature to have contemplated.

Another argument much relied on for the appellants was, if I rightly understood it, that, apart from the illegality involved in leaving a discretion to the master to name the port at which the voyage was to end, the contract, rightly construed, excluded any further stage in the voyage after Southampton, since all ports within home trade limits were excluded from the ports which she might visit "trading in any rotation." Thus her last cargo, on this contention, would have had to be shipped from some port other than one within home trade limits if she was to come home otherwise than in ballast, and the possibility of delivering a cargo shipped in the Black Sea at a port within home trade limits, and thence carrying on another for delivery at another port within home trade limits, say, in the United Kingdom, was excluded. This appears to me to be a quite arbitrary construction, and one which the contract certainly does not in express terms provide for; on the contrary, it involves a limitation, for which I can see no reason, on the ordinary meaning of the words used. The limits in which the ports must lie to which she may proceed after starting from Cardiff at the commencement of the voyage cover the whole home trade area, as well as a great deal more, and there is, therefore, express permission to visit ports trading in any rotation within the smaller as well as the larger area. I think the appellants' contention on this point fails.

I think the appeal should be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 29, 1907.

Solicitors: *Solicitor, Board of Trade; G. R. Thorne, Robinson & Co.; Botterell & Roche.*

[HOUSE OF LORDS.]

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PALACE SHIPPING COMPANY, LIMITED . APPELLANTS;

AND

CAINE AND OTHERS . . . . . RESPONDENTS.

Ship—Seaman—Contract of Service for Commercial Voyage—Refusal to proceed to Belligerent Port—Carriage of Contraband—Wages—Maintenance—Damages for Wrongful Discharge—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 134, 187, 188, 189.

British seamen signed an agreement for a voyage from Cardiff to any ports within certain limits, including Hong Kong, knowing that Russia and Japan were at war, that the ship was to carry coal to Hong Kong, and that coal was treated by both belligerents as contraband of war. At Hong Kong the master required the men to proceed with the coal to a naval base in Japan within the limits, and on their refusal illegally procured their imprisonment and left them at Hong Kong and proceeded to Japan without paying them their wages:—

Held that, the agreement being for a peaceful commercial voyage, the men were justified in refusing to go to Japan at the risk of war capture and its consequences; and that they were entitled to wages until the final settlement, and to the cost of maintenance for the same period under the head of damages for wrongful discharge.

Decision of the Court of Appeal, [1907] 1 K. B. 670, affirmed, Lord Atkinson dissenting as to the amount recoverable.

THE circumstances under which this appeal arose are stated in the judgment of Lord Loreburn L.C.

May 30; June 3, 5. *J. A. Hamilton, K.C.*, and *Dawson Miller*, for the appellants. The respondents were not justified in their refusal to proceed to Sasebo, which is a port within the limits prescribed by the articles. The cargo was lawful cargo according to English law, and not contraband, and a neutral is not deprived of his rights simply because one of his customers has become a belligerent. The adventure does not on that account cease to be an ordinary commercial voyage. Where a neutral carries goods of his own country to a belligerent, a captor cannot confiscate the cargo; he has only a right of pre-emption at a reasonable price: per Sir William Scott in the *Sarah Christina*. (1) Further, whether or not the cargo was contraband, as it belonged

(1) (1799) 1 C. Rob. 237.

to different owners the ship cannot be confiscated; only the freight is forfeited. The *Neutralitet* (1) was an exception, because the carriage of contraband was in breach of special treaty obligations. The general law has not been broken, though each of the two belligerents declared coal to be contraband. The contract was lawful; the order to go to Sasebo was lawful, as it was within the articles. The crew were not exposed to more than the ordinary risks attending commerce within the theatre of war, such as would have been involved in a voyage to a neutral port in that region. There was no Russian cruiser at or near Hong Kong, and there was no greater peril than that of which the respondents were aware when they signed the articles. War had then broken out, and the crew knew that coal had been declared to be contraband. In *Burton* v. *Pinkerton* (2) and *O'Neil* v. *Armstrong* (3) war had not broken out at the date of the contract; and, further, the effect of the men's continuing the voyage would have been to convert them into naval seamen. For the same reason *Austin Friars Steam Shipping Co.* v. *Strack* (4) is inapplicable; the war had not broken out when the contract was made, and the crew did not know the ship was carrying contraband. The cases in the King's Bench Division of *Lloyd* v. *Sheen* (5) and *Sibery* v. *Connelly* (6) are wrong, and in the latter case the non-disclosure by the captain of the owners' orders did not, as it was held, give a right to relief. The mere increase of risk, so long as the character of the voyage is not essentially altered, does not entitle a seaman to refuse service.

There was a "reasonable dispute as to liability" within the meaning of s. 134, sub-s. (*c*), of the Merchant Shipping Act, 1894. From the date of the arising of that dispute there could be no claim for wages until the final settlement. The latest date to which the term "final settlement" can be assigned is the judgment at Nisi Prius, when the cause of action merged in the judgment.

The amount awarded was in any case excessive. The Court of Appeal was wrong in allowing maintenance as well as wages. By s. 742 wages include "emoluments," but not maintenance,

(1) (1801) 3 C. Rob. 295.
(2) (1867) L. R. 2 Ex. 340.
(3) [1895] 2 Q. B. 418.
(4) [1905] 2 K. B. 315.
(5) (1905) 93 L. T. 174.
(6) (1905) 94 L. T. 198.

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except in the case of captains and mates. In s. 155 wages and provisions are treated as distinct and the latter only allowed when the seaman is on board. The trading came to an end at Hong Kong, and the men had to be sent home; and there was no claim for wages, as wages, from the moment of their being sent home. If the port had not been British, the master might have discharged his liability by paying the consul. If anything by way of damages was due, credit would have to be given for wages earned elsewhere. They also cited *Austin* v. *Dowling* (1); *In re Great Eastern Steamship Co.* (2); *The Rainbow.* (3)

S. T. Evans, K.C., and *Alexander Neilson* (*M. Morgan* with them), for the respondents. The master had no right to require the men to go to Sasebo. They engaged for an ordinary commercial voyage of a peaceful nature; and at Hong Kong it ceased to be of that character. The decision in *Burton* v. *Pinkerton* (4) is exactly applicable. The breach of contract here, as there, was, in the language of Kelly C.B., "the employment of this vessel for other than commercial purposes, and in a manner exposing the plaintiff to risks and dangers not within the terms of the contract." *O'Neil* v. *Armstrong* (5) is equally decisive. Here, as there, the defendants "entirely altered the character and conditions of the voyage," to use the language of Lord Russell C.J. and Charles J. (6) There was no payment or tender of wages at Hong Kong and no dispute about wages, and the result is that the wages ran on till a "final settlement" should be reached. It is for the appellants to shew that there has been a "final settlement." There has been none earlier than the judgment of the Court of Appeal, and under s. 134, sub-s. (*c*), of the Merchant Shipping Act, 1894, the wages continued to be payable to that date

The respondents were also entitled to maintenance, as the section is intended to cover all the seamen's loss occasioned "by the unlawful act or default of the owner or master"; and that would include the cost of the journey. The object of the Act

(1) (1870) L. R. 5 C. P. 534.
(2) (1885) 5 Asp. M. L. C. (N. S.) 511.
(3) (1885) 5 Asp. M. L. C. (N.S.) 479.
(4) L. R. 2 Ex. 340.
(5) [1895] 2 Q. B. 418.
(6) [1895] 2 Q. B. 70, 76.

was to save seamen from the cost and anxiety of litigation. Wages include emoluments, and maintenance is an emolument—a word with a wide meaning: *Reg.* v. *Postmaster-General* (1); "all by which he has benefited" is Blackburn J.'s language. The Court will construe a contract in the sense most favourable to the seaman: *The Nonpareil* (2); see also *Sivewright* v. *Allen*. (3)

J. A. Hamilton, K.C., in reply, referred to *Vallance* v. *Falle*. (4)

The House took time for consideration.

July 29. LORD LOREBURN L.C. My Lords, this is an action brought by nine seamen against the defendant company, as owners of the s.s. *Franklyn*, for malicious prosecution, wages and maintenance, and damages. The men agreed in December, 1904, by their articles to serve on a "voyage of not exceeding three years' duration to any ports or places within the limits of seventy-five degrees north and sixty degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, via Barry, and or any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master."

They sailed from Cardiff with a cargo of coals, and reached Hong Kong on February 20, 1905. War had been raging between Russia and Japan for more than a twelvemonth. At Hong Kong the men were told for the first time that the *Franklyn* was to proceed with her cargo of coal to Sasebo, a naval base of Japan. Coal had been declared contraband of war by both belligerents, and accordingly a vessel carrying coal to Sasebo was liable to be captured, if the Russians could capture her, and to be sent to a Russian port for adjudication. More than that, under the practice adopted by Russia in that war, she ran the risk of being sunk instead of being taken into port. The right to sink a neutral ship in such circumstances was wholly denied by

(1) (1876) 1 Q. B. D. 658, 665.
(2) (1864) 33 L. J. (Adm.) 201.
(3) [1906] 2 K. B. 81.
(4) (1884) 13 Q. B. D. 109.

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Great Britain, but it is none the less true that Russia claimed, and in some cases exercised, her supposed right.

If, therefore, the men had gone on with the ship to Sasebo, they ran the risk of losing their employment and their kit, of being cast adrift in a Russian port during war, and of their ship being destroyed on the high seas, and themselves exposed to whatever danger that might involve.

The master claimed that the men were bound to go on to Sasebo. The men refused, but offered to go if the captain would make good their wages and clothes till the time they arrived in the United Kingdom in the event of the ship being taken or sunk. The master said his owners would not allow him to do that; and no better evidence can be given to prove that in their opinion there was some real danger.

Upon this the master threatened the men that if they refused to proceed he would take them before the harbour master, who is also port magistrate.

That was done. The men still refusing to sail for Sasebo, the harbour master sentenced them to ten weeks' imprisonment, and they were imprisoned accordingly, with circumstances of much hardship and indignity. The wages they had already earned were not paid to them, but into the shipping office, and applied, it would seem, to defray the cost of maintaining the men in prison. At all events, no part was paid to the men. After serving their sentence they were sent home as distressed seamen, and reached London on July 15, 1905. In August they brought this action.

When this case came to trial the learned judge held that the action for malicious prosecution failed, as is now admitted, but awarded to the men their wages up to the time when they arrived in England. The Court of Appeal went further and ordered payment of wages from December 16, 1904, the date of the articles, down to "the date of the final settlement or judgment herein, that is to say December 21, 1906"; and further they gave the plaintiffs maintenance from February 20, 1905, up to December 21, 1906. It is manifest that both the learned judge and the Court of Appeal considered these men had been treated with harshness and injustice.

I think the same, but your Lordships will none the less give effect to the legal rights of the parties.

My Lords, in my opinion the conduct of the defendants to these men was illegal from beginning to end. It is suspicious that the destination in Japan was never communicated to the seamen till the ship arrived at Hong Kong. And though statutory provision has been made for the protection of seamen, the ancient power of the Admiralty Court to shelter them from wrong is not superseded. I cannot doubt that your Lordships would apply that jurisdiction in a fitting case. Here it is unnecessary. The master had no right to require that these men should sail for Sasebo, for the risk was not a commercial risk nor the voyage a commercial voyage such as the articles contemplated. The contention that there was in fact no danger of capture is not established. I cannot doubt that the owners themselves thought there was danger, and the men thought so also, and with reason. It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels, and nicely weigh the chances of capture. I will not say that the proceedings of the harbour master, purporting to act judicially, were vitiated by a departure from the safeguards of justice, for he is not before your Lordships; but I think his action in this case and his communications with the master of the *Franklyn* are a proper subject for further inquiry by those who have control in such matters. Undoubtedly the sentence was wrong and unjust, for no offence had been committed; and the refusal to pay the wages already due was illegal. The handing of the money to the shipping office was also illegal. I regard the whole transaction as a piece of calculated oppression, designed to force into a hazardous enterprise, partaking of the risks of war, seamen who had agreed to serve on a peaceful voyage.

I hold that the master wrongfully discharged and left behind these seamen under ss. 187 and 188 of the Merchant Shipping Act, 1894, for he procured their imprisonment on an unlawful ground. He obtained a certificate which recited the discharge, and he was bound under s. 189, sub-s. 3, of the Act to pay to these men themselves the wages due to them. This he failed to

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do. Accordingly, I am of opinion that s. 134 of that Act applies. The men lawfully left the ship, for they were compelled by law against their will to leave it. Their engagement was in fact ended, and they brought their action on the footing that it was ended a few weeks after their return to London. The delay in payment of their wages was not due to the act or default of the seamen, or to any reasonable dispute as to liability, for the liability to past wages was never disputed. It was due solely to the wrongful act or default of the owner or master. And, therefore, the seamen's wages continued to run and be payable until they received them, which was not till the judgment of the Court of Appeal. "Final settlement" in s. 134 means, in my opinion, payment or other such settlement as that section prescribes.

It is not easy to imagine a case more appropriate for the infliction of the sharp penalty provided by that section, the object of which is to require prompt payment and to prevent evasion of this duty either by carelessness or dishonesty.

The Court of Appeal awarded also a sum for maintenance, apparently regarding that as included in the term "wages." I would prefer to treat it as damages for the wrongful discharge. In the result it comes to the same thing, for the men were deprived of their provisions, and that was an item of their loss. We were reminded in argument that the men, or some of them, had earned something after their return to England in other service. If any deduction was to be made from the damages on that score, it ought to have been established for the shipowners in evidence. There is nothing which enables us to form any proper estimate of this deduction, and therefore I disregard it altogether.

I am accordingly of opinion that the judgment of the Court of Appeal should be affirmed.

LORD MACNAGHTEN. My Lords, I concur in the judgment that has just been delivered by my noble and learned friend on the woolsack.

It seems to me that there are three questions for our consideration:—(1.) Were the seamen justified in disobeying the order to proceed on the voyage from Hong Kong to Sasebo? (2.) Up to

what time are the seamen entitled to wages? (3.) Are they entitled to maintenance either as included in the claim to wages or as damages for breach of agreement?

On the first question I agree entirely in the view taken by the Court of Appeal. Although an expedition to Sasebo with contraband of war was not illegal, and although that port is to be found within the vast area described in the agreement as the intended scene of future operations, I think the voyage was not a voyage of the character contemplated by the agreement according to its fair meaning. A voyage to Sasebo, a naval base belonging to one of the two belligerents, would necessarily involve risks to life and property different from and in excess of those incident to the employment of seamen engaged in peaceful commerce.

The next question is, Up to what date are the seamen entitled to wages? It seems to me that this question is determined by reference to sub-s. (*c*) of s. 134 of the Merchant Shipping Act of 1894. At the time of the hearing before the Court of Appeal the men's wages had not been paid or settled as mentioned in that section. Inasmuch as the delay was not due to the act or default of the seamen, or to any reasonable dispute as to liability, or to any cause but the wrongful act or default of the owner or master of the *Franklyn*, the wages continued to run and be payable until the time of final settlement. There was no final settlement until an arrangement was come to in the Court of Appeal, and sanctioned by that Court after judgment was pronounced. Sub-ss. (*a*), (*b*) and (*c*) are connected by the common preface which limits their application to foreign-going ships. Otherwise sub-s. (*c*) is, I think, as much a distinct and independent enactment as if its provisions were contained in a separate section.

There is more difficulty about the question of maintenance. I do not think that the term "wages," as used in the Merchant Shipping Act of 1894, can include an allowance for maintenance. But I do not think that the judgment of the Court of Appeal ought to be disturbed, because it seems to me that the claim for maintenance may be sustained under the head of damages for breach of agreement. It is quite true that it appears that some

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at least of the seamen obtained other employment between the date of their wrongful dismissal and the final settlement of their wages. Wages earned in that employment might, perhaps, have been put forward as a ground of set-off against the claim for damages, but I agree with the Lord Chancellor in thinking that no case has been proved in this action which can fairly be taken into consideration in diminution of damages.

I am, therefore, of opinion that the appeal ought to be dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, I accept the statement of facts in the judgment delivered by my noble and learned friend on the woolsack, and I do not need to repeat them.

With the judgments delivered in the Courts below I agree. The main point to be determined is, Were the men justified in refusing to continue the voyage beyond Hong Kong to Sasebo?

I think they were. They shipped for an ordinary commercial voyage to a neutral port, a voyage subject only to the incidents of peace. Any other destination was kept back from them. It is true that coals had to their knowledge been proclaimed to be contraband of war; but there was no risk of seizure whilst on a voyage to Hong Kong. But when they were required to proceed to a naval base port of Japan their voyage became subject to the incidents of war, for they knew that their ship, when carrying contraband to Japan, would be a fair object of seizure by any Russian vessel she might encounter. It may well be that they were told that a portion of the Russian fleet was in Port Arthur, and that the Baltic fleet was still at Madagascar. Their general knowledge would tell them that Russia had many ships afloat, and that any one of them cruising off Sasebo might capture and carry the ship to a Russian port to be, according to the Russian proclamation, condemned.

In determining what amounts to a justification for seamen refusing to proceed to sea, I do not think that they are called upon to prove by positive and legal evidence that there was an actual probability of capture; their decision has to be formed upon such general information as is at the moment at their

disposal. Doubtless their decision must not be based on merely arbitrary grounds. Good faith is a necessary element, and such good faith would not exist unless some reasonable grounds for the refusal can be alleged.

In this case I certainly should, for the reasons I have given, find as a fact that such reasonable grounds existed. The authorities that were quoted at the Bar, and in the Courts below, seem to sustain this view. I particularly refer to *Burton* v. *Pinkerton* (1); *O'Neil* v. *Armstrong, Mitchell & Co.* (2); and *Sibery* v. *Connelly.* (3)

The suggestion that the conviction at Hong Kong amounted to an estoppel against the reasonableness of the men's refusal being alleged was, I understood, not persisted in; at any rate, it cannot be maintained. The alleged tender of the wages at Hong Kong was accompanied by a demand that the seamen should in effect abandon all further claim for wages. They rightly refused to do so.

I am well aware of the difficulty there is in dealing with the exigencies of service in the mercantile marine in distant ports, and, therefore, I refrain from saying more than that I deeply regret that it was found necessary to sentence these men, who were acting in perfect good faith, to ten weeks' imprisonment—an imprisonment accompanied by much indignity.

The amount to be recovered and the method of recovering it are matters of some practical difficulty. It suffices for me to say that I concur with the views expressed by the Lord Chancellor on this subject. I submit that the appeal should be dismissed with costs.

Lord Robertson. My Lords, while I share some of the difficulties which are expressed in the judgment of Lord Atkinson, I do not disagree with the affirmance of the judgment under appeal.

Lord Atkinson. My Lords, I have the misfortune to differ from my noble and learned friends who have preceded me, but

(1) L. R. 2 Ex. 340. (2) [1895] 2 Q. B. 70, 418.
(3) 94 L. T. 198.

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only as to the amount to be recovered and the principle on which it is to be recovered.

The main questions for decision in this case are, in my view, whether the crew of the ship *Franklyn* were, under the terms of the contract contained in the articles which they had signed, justified in refusing to serve in the ship on the voyage from Hong Kong to Sasebo; and, if so, whether they were entitled to recover damages for their illegal dismissal on the ordinary principles applicable to such a cause of action, or entitled to recover the penalties imposed by the 134th section of the Merchant Shipping Act, 1894, plus compensation for loss of maintenance?

There is no doubt that the carriage of contraband goods in time of war in a neutral ship is not in itself an illegal act. It merely subjects the ship to the risk of being captured by one of the belligerents and treated as a lawful prize of war.

It is, I think, equally clear that this risk of capture is not one of the risks ordinarily attending a commercial voyage or adventure of a peaceful nature. The risk of capture may be so remote as to leave the character of such a voyage practically unchanged, or so proximate and imminent as to entirely change its character. It must be a question of degree to be determined in each case on its own special facts; but it would certainly appear to me that a voyage with a contraband cargo, across seas which are admittedly the theatre of war, to a port belonging to one of the belligerents which is itself a naval base, and therefore likely to be the object of such surveillance and attack as the other belligerent is able to subject it to, or direct against it, is prima facie not an ordinary commercial voyage of a peaceful nature. It was, however, for an ordinary commercial voyage of a peaceful nature that the crew in this case engaged to serve. And, in my opinion, the burden of rebutting the prima facie presumption above mentioned, and establishing that the risk of capture was so remote that the character of the voyage remained practically unchanged from that which the crew supposed it to be when they signed the articles, rested upon the owners of the ship or their agent, the master. I do not think that they or he discharged that burden simply by proving that at the port from

which the voyage across the theatre of war was to commence it was the opinion of officials in a position to judge that, owing to the crippled condition of the naval forces of that belligerent by whom capture, if it was to take place, was to be apprehended, there was no real risk or danger of capture at all.

On the facts of this case, I am therefore of opinion that the crew of the *Franklyn* were justified in refusing to serve on the voyage from Hong Kong to Sasebo, on the ground that that voyage was attended with other and different risks, and was of a different character from the risks and character contemplated by the contract into which they had entered, and that by so refusing they had not committed any breach of their contract or any offence under the 225th section of the Merchant Shipping Act, 1894. What took place at Hong Kong at the instance of the master of the ship amounted to a breach by the owners of the contract entered into by them with their crew. Each member of the crew could, on his return to this country, have sued the owners to recover damages for this breach of their contract, and the measure of such damages would have been the loss of wages and maintenance from the time they left their ship till they had, on their return to this country, obtained employment in their calling, or until a reasonable time had elapsed to enable them to obtain it, whichever was the shorter period. Their treatment at Hong Kong could not, in my opinion, be legitimately taken into account in measuring their damages for this breach of contract.

The crew might have taken another course, namely, that taken by the crew in the case, so much relied upon, of *In re Great Eastern Steamship Co.* (1) They might have accepted their discharge, terminated their engagement, and thus brought themselves within the provisions of s. 134 of the above-mentioned statute, and recovered the penalties imposed by it, if the wages earned by them up to the time when their engagement terminated had not been paid to them. There was no dispute about the amount of these wages. The dispute, such as it was, arose out of an entirely different matter, namely, their obligation to serve on the voyage to Sasebo.

The crew, however, did not take that course. They refused to

(1) 5 Asp. M. C. 511.

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sign off the ship and thereby terminate their engagement. They, on the contrary, insisted that their engagement continued. They were within their rights in so insisting: *Frost* v. *Knight* (1); but, having insisted that their engagement continued notwithstanding their illegal removal from their ship under compulsion of legal process, they cannot now in my view be permitted to contend that they "lawfully left their ship at the end of their engagement" so as to bring themselves within the words of sub-s. (*a*) of s. 134 of the Merchant Shipping Act of 1894. In my opinion s. 134 does not apply to the case at all. I have been unable to persuade myself that sub-s. (*c*) of that section applies to any case not falling within sub-ss. (*a*) or (*b*) of that section. The words of sub-s. (*c*), "in the event of the seamen's wages or any part thereof not being paid or settled as in this section mentioned," must, I think, be interpreted to mean as mentioned in the two preceding sub-sections (*a*) and (*b*), as those sub-sections, and those alone, contain provisions as to how the wages properly so called are to be paid, sub-s. (*c*) dealing with the infliction of penalties for non-payment, and with that alone.

If the damages were awarded by Lawrance J. on the assumption that this section did apply, as they appear to have been, they were in my opinion awarded on a wrong principle; but, as I find from the last paragraph on page 46 of the appendix that he stated that he would give judgment "up to such time as the men came back to this country and got work again," I think the amount awarded is such as the seamen would have been entitled to recover as damages for illegal dismissal, irrespective altogether of the provisions of s. 134. I am therefore of opinion that his judgment for this sum should be allowed to stand.

The Court of Appeal have not only awarded wages from December 10, 1904, the date of the articles sued upon, down to the date of this order, but have also allowed maintenance from February 20, 1905, down to the same date, on the ground, apparently, that "wages" in s. 134, sub-s. (*c*), includes maintenance, and that this order on appeal is the "final settlement" mentioned in that sub-section. With all respect to the learned Lords Justices, I think that their conclusion on this point is

(1) (1872) L. R. 7 Ex. 111.

erroneous. It is obvious that the word "wages," as used in sub-ss. (*a*) and (*b*) of s. 134, cannot include maintenance, as prima facie wages are earned while the seamen are serving on the ship and are presumably maintained. There is no reason for giving to the word a different meaning in sub-s. (*c*) of the same section. And, besides, it is, I think, impossible to read the fasciculus of sections from 134 to 167, both inclusive, and especially ss. 159, 160, 161, without coming to the conclusion that the word "wages" is not used in the statute to cover maintenance, and that the "emoluments" which the word "wages" is defined to cover by s. 742 do not include maintenance.

I accordingly am of opinion that the judgment of the Court of Appeal should be reversed in that respect, and the appeal allowed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 29, 1907.

Solicitors: *Botterell & Roche, for Weightman, Pedder & Weightman, Liverpool; Chivers & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 July 9.

EDEN AND OTHERS . . . . . APPELLANTS;

AND

NORTH-EASTERN RAILWAY COMPANY . RESPONDENTS.

Railway Company—Mines—Compensation—Coal required to be left unworked—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 78.

The compensation payable by a railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, in respect of such mines as they require to be left unworked is the full value of the minerals required to be left unworked, namely, what the minerals would have sold for if worked, less the cost of working them.

Decision of the Court of Appeal, *Joicey & Co.* v. *North-Eastern Ry. Co.* [1907] 1 K. B. 402, reversed, and decision of Bigham J., [1906] 1 K. B. 195, restored.

THE facts relevant to this appeal and the respective contentions of the parties are stated in the judgment of Lord Loreburn L.C. in this House, and in the reports of the decisions below. Bigham J. held that the railway company must pay compensation upon the principle stated in the head-note—730*l.* to the lessees of the coal and 155*l.* to the lessors. The Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.) held that the compensation must be paid on the principle stated in their judgments—100*l.* to the lessees and 310*l.* to the lessors. Hence the present appeal.

May 7. *C. A. Russell, K.C.*, and *MacSwinney*, for the appellants. The obligations of the railway depend wholly upon the Railways Clauses Act, 1845, of which the relevant sections are 6 and 77 to 85. Sect. 6 is general in its terms, and incorporates the Lands Clauses Act, and provides that the company shall make "full compensation for the value of the lands so taken or used." Sect. 77 excludes minerals from the lands to be purchased by the railway, and the next eight sections constitute a code regulating the procedure in the case of mines. By s. 78 "compensation" is to be made for the minerals required by the company to be left unworked. The measure of compensation has repeatedly in this House been held to be the value of the minerals so left in

situ. "The whole value of the minerals" is the language of Lord Cairns in *Smith* v. *Great Western Ry. Co.* (1) Complete indemnity must be given to each interest affected. This principle was enforced (before the Acts of 1845, which deal with the compulsory acquisition of land and the construction of railways) in *Barnsley Canal Co.* v. *Twibell.* (2) The value is what the coal or other mineral is worth to the person from whom it is taken: *Livingstone* v. *Rawyards Coal Co.* (3) In *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (4), a case under the like provisions of the Waterworks Clauses Act, 1847, the value of the coal had increased after the counter-notice and before the time of payment, and the waterworks company had to pay the increased amount. Lord Macnaghten said that the mineowner "is to be placed in the position in which he would have been if he had been free to go on working." In *Midland Ry. Co.* v. *Robinson* (5) Cotton L.J. said it was not necessary that the mineowner should himself desire to work the mines, if he intended to do so by his lessees, and his language was approved by Lord Herschell in the House of Lords. (6) Here the appellants Joicey & Co. had time enough under their lease to get all the reserved coal, and for that, and nothing less, they are entitled to full compensation. It is no answer to this claim that instead of the reserved coal they might work other coal in their mine. There might be colour for that contention if the word were "damages" and not "compensation." The respondents have no right to prescribe to the appellants the way in which the appellants were to conduct their own business. Their duty is simply to pay for coal which is left ungotten to provide for the security of the railway.

Cripps, K.C., and *Upjohn, K.C.* (*Ryde* with them), for the respondents. The appellants are entitled to compensation or indemnity, not profit. By s. 78 agreement between the parties is in the first instance contemplated. But if the parties do not agree "as to the amount of such compensation, the same shall

(1) (1877) 3 App. Cas. 165, 179, 180.
(2) (1844) 13 L. J. (Ch.) 434.
(3) (1880) 5 App. Cas. 25.
(4) [1903] A. C. 426.
(5) (1887) 37 Ch. D. 386, 397.
(6) (1889) 15 App. Cas. 19, 32.

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be settled as in other cases of disputed compensation." Thus compensation is the equivalent of damages, and must be assessed on the principles applicable to ordinary cases of damage. All the circumstances must be considered. The compensation in s. 6 is to be made to all parties "injuriously affected" by the construction of the railway. If the mineowner or lessee can without loss work coal in another part of the mine instead of the reserved coal, he is not "injuriously affected." If the appellants' contention be correct, the lessee or owner might be in a much better position than he was before receiving the notice. It is not a question of purchase, but the cost of an embargo. As Lord Robertson expressed it in the *Bwllfa Case* (1), the compensation is "for being thus prevented from working the coal." The use of the word "compensation," and not purchase, is in the respondents' favour, and suggests an equivalent. In *Bidder* v. *North Staffordshire Ry. Co.* (2) Bramwell L.J., in giving the judgment of the Court (Bramwell, Brett, and Cotton L.JJ.), said that where a house in a street was taken, and another equally suitable to the business was available in the same street, no compensation was payable for goodwill. The amounts payable to the lessor and lessee respectively will vary according to the amount of coal under the lease and the length of the lease. Here the lessee could work the embargoed coal during the lease, though not all in the mine. If in substitution of the reserved coal the lessees work another part of the mine, their part of the compensation will be less and that of the reversioner greater, as there will be less coal left. In that case the 310*l.* for the reversioners and the 155*l.* for the lessees will be just for both interests.

The House took time for consideration.

July 9. LORD LOREBURN L.C. My Lords, the appellants, Mr. Eden and others, are lessors and lessees of coal mines, part of which lie under the line of the North-Eastern Railway. In 1892 the lessees were desirous of working the coal lying under part of the line, and, conformably with the Railways

(1) [1903] A. C. 432.

(2) (1878) 4 Q. B. D. 412, 432.

Clauses Consolidation Act, 1845, gave notice to the railway company under s. 78 of that Act. Thereupon the railway company required the lessees to leave certain portions of the unworked coal under their line for its support, expressing their willingness to pay such compensation as the law required. In this way the railway company became bound to pay, in accordance with the Act of Parliament, "compensation for such mines or any part thereof," whatever that means. What it does mean is the real question here.

Very few further facts need notice. The lessees in the ordinary way and regular course of working would have worked this coal immediately had they not been obliged under the statute to leave it as a support for the railway. Had they so worked it, they would have made a clear profit out of it of 730*l.*, and the lessors would have received as rent in respect thereof the sum of 155*l.* Accordingly, if the proper basis of compensation is the profit which lessor and lessee respectively would have made by working the coal as it would have been worked in the ordinary course, then the sums payable by the railway company are 730*l.* and 155*l.* respectively. And that is what they claim in this appeal.

The arbitrator has further found that "there is left unworked in the Shield Row Seam" (that is, this seam) "under the said lands a quantity of coal which the coal company will not in the ordinary course be able to exhaust within the term of the before-mentioned lease, which expires on January 1, 1907."

So if the lessees, instead of working the reserved coal, chose to work some other part of the same mine, they would be able to make their profit on the substituted coal instead of on the coal which they would have worked if they had not been obliged to leave it for support as described.

The railway company fasten, legitimately enough, on this circumstance as the foundation of their argument. They contend that the statute does not require them to purchase this coal, which literally is true, but merely to compensate the owners thereof. And they urge that the lessees, though wishful to work this particular coal, had plenty more which they might work, and in fact did work, instead of it. Thus, argues the railway

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company, the lessees will be indemnified if they receive the increased expenses and loss to which they have been put by having to work this substituted coal instead of the reserved coal. And, they say, compensation means indemnity, and no more.

Now, if this be the true view, the lessees are entitled only to 100*l.*, and that sum is payable on the ground that the prohibition to work the reserved coal tended in some degree to accelerate a diminution of output in these mines, and also to accelerate the time when the lessees would be obliged to work coal more expensive to get. The railway company, no doubt, would admit that, in addition to this payment, they would have been liable to compensate the lessees for the profit they would have made in working the reserved coal itself ultimately when they had exhausted the other coal in their mines. But that point does not arise, for there is so much other unworked coal that the lessees cannot, in the ordinary course, exhaust it before the expiration of their lease.

So likewise in regard to the lessors. The railway company contend that the measure of compensation payable to the lessors is not the rent which the lessors would have received in respect of the reserved coal if it had been worked, but the diminution in the value of the reversion caused by service of the statutory notice, and estimated at the date of such notice. It is agreed by the parties that upon this footing the lessors are entitled to 310*l.* And the railway company argue that this sum, and not 155*l.*, is what the lessors are entitled to receive; for, say they, compensation means indemnity, and no less.

In deciding between these rival contentions the first step is to weigh the language of the Act of Parliament itself. The words used in s. 78 are "compensation for such mines or any part thereof." Looking at that section and at s. 6, the railway company is to compensate owners for the value of that part of the mines which is "taken or used." In its primary sense the Act certainly appears to mean that the owners, according to their several interests, are to receive the value of the actual coal actually placed under embargo.

If one and the same person owned the mine and worked it, the obvious course would be to say: "You are about to work this

coal, and if you work it you would make a net profit of, say, 500*l.* We prevent you from working it, and so we pay you 500*l.*" It would be very strange if in such a case a railway company could reply: "You have a very large coal-field of 100 acres in extent. We are preventing you from working only one acre. You must first work out your other ninety-nine acres, and that will take you twenty years. Accordingly we will not pay you 500*l.*, the present profit you would make on the one acre, but we will pay you the present value of the profit which you would have made twenty years hence out of this one acre had we not laid an embargo upon it. If you have suffered any other loss by diminution of output or increase of working expenses, we will pay that too."

I cannot think that such a principle could be defended. It would make the measure of payment depend upon the size of the coal-field, and the length of the term. If it were applied to building land worth 200*l.* an acre over all, the sum payable for a small part of it taken compulsorily might be much less than the selling value on the plea that the whole of the land would not be sold for building at once, and that it was to be assumed the plot compulsorily taken would have been the last to be sold for building. Whether the land is "taken" or is "used" within the meaning of the Act seems to me a matter indifferent. The value must in either case be paid.

That being the rule where there is only one interest in the land or mine, namely, the fee simple, is there any difference where there are, as in this case, a lessee's interest and a reversionary interest? According to the railway company's argument, the rule I have stated would not then apply. I cannot see why it should not apply. What is taken away from the owners and what is given to the railway company is the same whether the ownership is in one hand or in more, and whatever be the size of the coal-field or the length of the term. There must be a distribution among those entitled to compensation, if they be more than one; but the sum to be distributed must still be the same, namely the value of what has been taken from them, and that is the value of the reserved coal at the time it was laid under an embargo. That value is found to be in all 885*l.*, of which 730*l.* is allotted to the lessee and 155*l.* to the lessor.

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It is true that upon the figures stated in the special case, apportioning to lessor and lessee their several shares, the lessees will on this footing be able to make a profit out of the transaction beyond what they could have made if the coal had not been taken under the Act. It is also true that the lessors will only receive 155*l.*, while the damage done to the reversion by the railway company's exercise of statutory powers amounts to 310*l.* But these figures were mostly agreed figures. The division of the money might have been different if it had been disputed. I believe it must have been different. Further, in the special case it is assumed that the lessees whose term is limited will work only at the usual rate of working. They are entitled to work more rapidly if they please, and in proportion to the rapidity of working the anomaly in the distribution will disappear. I cannot argue from agreed figures to a principle of law.

On the other hand, if the respondents are in the right, then the railway company will get for 410*l.* that which is worth 885*l.* This shews the danger of departing from the simple principle that a railway company under this Act is to pay the value of what it takes or uses. How the proceeds are to be divided may be a complicated question. It is not in dispute here between the lessor and lessee. What is in dispute is the sum payable by the railway company, and on that I agree with the decision of Bigham J.

LORD MACNAGHTEN. My Lords, it seems to me that the judgment of Bigham J. is perfectly right. It is, I think, in accordance with the provisions of the Railways Clauses Act as to mines and minerals, and consistent with views expressed in this House on more than one occasion.

I do not propose to trouble your Lordships by going through the sections of the Act which bear upon the question in debate. They have often been cited here, and your Lordships are, I am sure, familiar with them. But I will take the liberty of quoting a passage from the judgment of Lord Watson in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie*. (1) It contains,

(1) (1888) 13 App. Cas. 657, 675.

I think, a remarkably clear and accurate exposition of the scope and effect of the provisions of the Waterworks and Railways Clauses Acts concerning mines and minerals. "The relation," says Lord Watson, "which they establish between seller and purchaser in regard to all minerals which may be held to be excepted, appears to me to be, as Lord Westbury said in *Great Western Ry. Co.* v. *Bennett* (1), clearly defined, useful to the railway company or waterworks undertakers, and at the same time fair and just to the mine owner. The latter, who is forced to part with the surface of his land and all uses for which it is available, is not compelled to sell his minerals, whilst he is not in a position to ascertain their marketable value or the impediments that might be occasioned to the convenient working of his mineral field by his parting with a strip which intersects it. On the other hand, those who deprive him of the right to a portion of the surface and its uses by compulsory purchase enjoy the benefit of subjacent and adjacent support to their works without payment so long as the minerals below or adjoining these works remain undisturbed; but it is upon the condition that if they desire such support to be continued they must make full compensation for value and intersectional damage whenever the minerals required for that purpose are approached in working and would in due course be wrought out."

So Lord Watson's opinion certainly was that if the undertakers require the use in perpetuity of part of the mine for the support of their works they must make compensation, and the compensation must be the value of the minerals left unworked. The same view was expressed in *Smith* v. *Great Western Ry. Co.* (2) That was a case where the notice to the railway company had been given by a lessee. "It is to be observed," said Lord Penzance, "that the directors are not only to arrange with the lessee, but if he is a person who is entitled to take all the coal, the compensation for preventing him from taking the coal must be the full value of the coal left. The full value of the coal, and nothing less than the full value of the coal, deducting, of course, the cost of getting it, must be the measure of the compensation which would be due to the lessee."

(1) (1867) L. R. 2 H. L. 42. (2) 3 App. Cas. 165, 185.

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The same view is to be found in several other cases. For instance, Lord Westbury in *Great Western Ry. Co.* v. *Bennett* (1) and Lord Herschell in *Midland Ry. Co.* v. *Robinson* (2) both speak of the consequence of a counter-notice by the railway company as a "purchase" of the minerals comprised in the counter-notice. Having regard to the point which arose and was decided in the *Bwllfa Case* (3), the word "purchase" may not perhaps be the most accurate expression that could be applied to the transaction, but at least it shews, beyond the possibility of doubt, that the understanding of those two noble and learned lords was that the coal required to be left unworked was to be bought and paid for in full.

Now when the language of the enactment is tolerably plain, and the views expressed in this house have been uniformly consistent with the ordinary meaning of the language used, I have some difficulty in understanding the judgment of the learned judges of the Court of Appeal. They seem to have ignored s. 78 altogether, and to have treated the case as if it fell under s. 81. Sect. 81 does provide for compensation for damage "by reason of the continuous working of the mines being interrupted." But the compensation, which is provided there, is given for what Lord Watson calls "intersectional damage." As the enactment says, it is meant to cover "additional" losses. It is to be in addition to, not in substitution for, the compensation to be provided by s. 78.

Of course, although some things are clear, there are difficulties in the construction of these sections. It is clear that the only person who can initiate proceedings by giving notice under s. 78 is the person actually working the mine, whether he be owner, lessee, or occupier. And he can only give notice when he is approaching the protected area and is in a position to get the minerals within it. When the company give their counter-notice, defining the minerals which they require to be left unworked, and signify their willingness to make compensation, further working is prohibited, and the obligation on the part of the railway company to make compensation arises.

(1) L. R. 2 H. L. 42. (2) 15 App. Cas. 28.
(3) [1903] A. C. 426.

But then the only person who can give the notice may have merely a temporary or precarious interest. What is to happen in that case? And how is the compensation to be dealt with? But these difficulties are, I think, more apparent than real, and would probably disappear in practice. There is no difficulty in the present case. All persons interested are before the Court. There is no controversy between lessor and lessee. The lessee says: "I am in a position to work out the whole of the coal within the protected area, and I am entitled to do so." The lessor says: "That is quite true, but I must have my royalty." There can be no dispute about the lessor's claim, nor can there, I think, be any doubt that the lessee is entitled to be paid the whole value of his interest in the coal which the railway company require to be appropriated in perpetuity as and for a support for their works.

Then it was said: "If there is to be an embargo on working, and the lessee is to be paid the value of the coal left unworked, he will be free to use his appliances and machinery in some other part of the mine comprised in his lease, and so he will get what Vaughan Williams L.J. calls a 'windfall,' and the position of the reversioner or those who may be his successors will, or may be altered too." Well, it may be so. But what have the railway company to do with that? They prevent the lessee from working. They are entitled to do so on signifying their willingness to make compensation. It cannot surely be any concern of theirs how their action, which is perfectly legitimate, affects the interests of others. If anybody is aggrieved he has, or may have, his remedy, but it will not be against the railway company. They are secure. Whatever comes of it, they will be none the worse. The conclusion at which the Court of Appeal has arrived seems to me to lead to results both unjust and inconvenient. As Vaughan Williams L.J. says, one result is that the railway company "get the user of the reserved pillar of coal for practically nothing." Surely that is unjust. And it must be highly inconvenient on a question of compensation to permit the company to embark on an inquiry as to how the lessee can best mitigate the loss sustained by the embargo on his operations. The railway company have no right to a general

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inspection of the plans of his workings. They have no right to manage his business for him, or to direct his operations. Their simple duty is to pay compensation for the use of the support which they require. And in this case there is no dispute or question as to the parties to whom the compensation is payable.

I am therefore of opinion that the appeal must be allowed, and the judgment of Bigham J. restored, with costs both here and below.

LORD JAMES OF HEREFORD. My Lords, as my noble and learned friend the Lord Chancellor has stated the formal matters out of which this case arises, I do not purpose to repeat them in my judgment.

It is found as a fact, in the special case upon which these proceedings are based, that if this notice had not been given and obeyed the coal in question would have been worked by the coal company in due course from December 31, 1903, and thereby a profit of 730*l.* would have been made, whilst the lessor would have received as rent a sum of 155*l.* In answer to the claim for these two sums the railway company rely upon the facts stated in the special case. In effect this answer is that the coal company had other coal, the subject of their lease, which they could have worked instead of the coal by the notice forbidden to be worked, and which workable coal would last until the end of their lease in 1907, that the entire expense of working such coal beyond that of working the notice coal was 100*l.*, and that this was the only compensation the appellants were entitled to.

The question, therefore, for determination is clearly defined: Are the lessors and lessees entitled under the terms of s. 78 of the Railways Clauses Act to the profit of the coal they were prevented from working, or are they entitled only to be compensated for the increased cost of working the more distant coal?

Now the words of the section are: "If the company be willing to make compensation for such mines" (the subject of the notice) "the owner shall not work or get the same." The notice not to work was given under this 78th clause, and was intended to offer to bear the liability created by it.

Now it is said by Bigham J.: "What is the railway company to pay for?" It is to pay "for such mines," that is in this case for the coal it required to be left unworked. The railway required the support of certain coal, and in justice there seems no reason why the actual value of such support should not be paid for. The mine owners are to be paid for the net value of the coal they are precluded from working, and I can find nothing in the statute to shew that if substituted coal can be worked that coal which the railway has laid an embargo upon and so appropriated shall not be paid for. Such, expressed in very plain and forcible language, is Bigham J.'s judgment.

The Court of Appeal, however, throw upon the coal owners the duty of looking around in order to find some other workings which should compensate them for the loss sustained through obeying the notice of the railway company. I find nothing in the words of the 78th section to justify this judgment, and as I think Bigham J.'s view is correct, I submit that the decision of the Court of Appeal should be reversed.

LORD ATKINSON. My Lords, no question was raised in this case as to the bona fide intention of the owner to work by his lessee the minerals for which compensation is claimed.

Under the provisions of the 78th section of the Railways Clauses Act, 1845, in a case such as this the mines are to be compensated for.

It is quite true, as was insisted upon by counsel on behalf of the company, that there has not been here any sale or transfer of any property or of any right or interest in it; but the minerals of the owners have been dedicated, as it were, to the use of the company. The only purpose they can subserve while the railway continues to exist is to support the superincumbent soil of the company, and the owner of the minerals, or of any interest in them, will be as effectually deprived of the use, benefit, and enjoyment of them as if they had been destroyed or removed and disposed of.

I do not think that any appreciable deduction can be made from the sum the company are bound to pay as compensation by reason of the remote contingency that, should the railway

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cease to exist, the owner's right to work and win these minerals will revive.

This result has been brought about not by a tortious act, whether wilful or negligent, but by the legitimate exercise by the railway company of a right conferred upon them by statute.

On what principle, then, is compensation to be paid by the railway company? If the minerals had not been leased and had been removed innocently, that is, removed without the commission of any tortious act, the owner would have been entitled to obtain as compensation the value of these minerals in situ. If, as in this case, there be no physical difficulty in the way which would render the working, mining, and raising of them not reasonably practicable, then a fair test of that value would be the price the minerals would fetch as and when won and raised, less the cost of working the mine, winning and raising them.

Now, the principle on which an owner is to be compensated when his property is thus innocently destroyed is in *Livingstone* v. *The Rawyards Coal Co.* (1) laid down by Lord Hatherley in the following words: "Those principles are that the owner shall be repossessed as far as possible of that which was his property, and that in respect of that which has been destroyed or removed or sold or disposed of, and which cannot therefore be restored in specie, there shall be such compensation made to him as will in fairness between both parties give to the one party the whole of that which was his, or the whole value of that which was his, and will at the same time give to the other, in calculating that value, just allowance for all those outlays which he would have been obliged to make if he had been entering into a contract for that being done which has by misfortune or misadvertence on both sides and though by no fault been done." There has been no outlay here by the company such as is in this passage adverted to. There was no physical difficulty in working the mine such as existed in the latter case. And, therefore, it appears to me clear on the authority of *Smith* v. *Great Western Ry. Co.* (2) and *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd*

(1) 5 App. Cas. 34. (2) 3 App. Cas. 165, 179, 180.

Waterworks Co. (1), that if no lease had been executed, the contingency of the railway ceasing to exist being negligible, the owner would have been entitled to receive as compensation the full value of the minerals in situ.

This sum the railway company would, in my opinion, be bound to pay. I cannot follow the reasoning by which it is sought to establish that the company should pay a smaller, or a different sum because the proprietor's rights have been split up, as it were, and an estate or interest in the property created by him in another.

Though, no doubt, it may in some cases be a matter of difficulty to apportion between the several persons interested the sum to be paid by the company as compensation for the property, of the benefit and enjoyment of which they all have been deprived, in this case no such difficulty, I think, exists. If the lessee had continued to win and raise and sell this coal, it is found that he would have made, after deducting the royalty and cost, 730*l.*

Taking the test I have mentioned, the value of the coal in situ therefore was this 730*l.*, plus the royalty, that is, 855*l.* in all, and I think that value the company must pay.

It would seem to me that a fair way of dividing the value of the coal in situ between the lessor and lessee is to give to the lessor the royalty he would have been entitled to had this coal been won and raised and sold, and to the lessee, who was entitled to win and raise them, the balance of this sum of 855*l.*, namely, 730*l.* The lessee has worked and won coals in another part of the mine included in his lease, coals which it is found he could not have won had he continued to work the coal put under embargo. He has paid the royalty on the coal so won in the new area. And it is quite true that if, at the termination of the lease, the price of coals should be such that the lessor could get for the coal in the new area, which but for the notice from the railway company would have been then unworked, a higher royalty than that reserved by this lease, the lessor would have been damnified to the extent of the difference between the two royalties; but if the price of coal should have then so fallen that

(1) [1903] A. C. 426.

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the possible royalty would have been less than that actually received, he would in the remote result have gained by the action of the railway company in diverting the activities of the lessee from the old to the new area. It is difficult to see how that affects the railway company. They are bound to pay the owners the value of the property they take. The proportions in which those owners may be disposed to divide the sum so paid between them is a matter with which they have no concern.

Again, it is urged that since it has been found that the lessee could not have worked the two areas, the old and the new, and as it only cost him 100*l.* more to work the new district than it would have cost him to work the old, the lessee is to be paid nothing more than this 100*l.*

This contention assumes a right in the company to take from, or render useless, a man's property which he may be engaged in working at a profit, and to pay him nothing for it, because he may happen to have other property lying waste, on which, if he expended the labour and capital employed on that taken, he would realize an equal profit if it so happened that he should not be able to work or cultivate both at the same time.

I think, therefore, that the true measure of compensation is that set forth in the seventeenth paragraph of the special case; and that the question submitted by the arbitrator should be answered to this effect, the appeal allowed, and the judgment of Bigham J. restored.

Order of the Court of Appeal reversed and judgment of Bigham J. restored, with costs here and below: Cause remitted to the King's Bench Division.

Lords' Journals, July 9, 1907.

Solicitors: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne; R. F. Dunnell, York.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL (AT THE RELATION OF MAYOR, &c., OF BIRKENHEAD) AND OTHERS . . APPELLANTS;

AND

MERSEY RAILWAY COMPANY . . . . . RESPONDENTS.

H. L. (E.) 1907 *July* 9.

Railway Company—Omnibus Business—Incidental Powers—Ultra vires.

A railway company without express power to run omnibuses ran omnibuses in a way which was in this House held as a matter of fact to be not incidental to or consequential upon their statutory powers:—

Held, that the company must be restrained from carrying on the omnibus business, and that the undertaking required and sanctioned by the Court of Appeal was impracticable.

Decision of the Court of Appeal, [1907] 1 Ch. 81, reversed.

Decision of Warrington J., [1906] 1 Ch. 811, restored.

THE respondents established a system of omnibuses in connection with their railway in a manner which is fully described in the reports of the decisions below and indicated in the judgments of this House. Warrington J. granted an injunction to restrain the company, and this decision was reversed by the Court of Appeal, the company giving an undertaking as to the mode of carrying on the omnibus business.

July 8, 9. *Cripps, K.C.*, and *Leslie Scott*, for appellants.
Upjohn, K.C., and *A. B. Shaw*, for respondents.

LORD LOREBURN L.C. My Lords, in this case the question is whether a railway company is entitled to run a number of omnibuses which it says are incidental to the railway enterprise itself. The rule of law has been laid down in this House (1) to the effect that it must be shewn that the business can fairly be regarded as incidental to or consequential upon the use of the statutory powers; and it is a question in each case whether it is so or whether it is not so. In the present instance I do not think that this business of running an

(1) See *London County Council* v. *Attorney-General*, [1902] A. C. 165, and cases there cited.

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omnibus system can be regarded as fairly incidental to or consequential upon this statutory enterprise. It seems to me that in substance it was an undertaking for the purpose of enabling the railway company successfully to compete with a ferry which belonged to others.

It is unnecessary to elaborate the distinctions between this and other cases that have been quoted, because I do not believe that much assistance is derived by reasoning from analogy when the question at issue is in substance either a question of fact or at least a mixed question of fact and law. I agree with the judgment given by Warrington J., who granted an injunction. The Court of Appeal have limited the injunction, or, what is the same thing, have refused the injunction, but required an undertaking. In my view that undertaking is one which could not be carried out in a business sense; and I think it involves the admission that, under restrictions such as are included in the undertaking, this business would be intra vires. I am of opinion that the order appealed from should be reversed.

LORD ASHBOURNE. My Lords, I quite agree with the judgment of the Lord Chancellor.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

It seems to me that the order which has been discharged by the Court of Appeal must be restored. I think that the judgment of Warrington J. was perfectly right, and that no other order was possible. I have some difficulty in following the train of reasoning which led two learned judges of the Court of Appeal to replace it by an illusory undertaking, while they both admitted, if I understand their views aright, that what the respondents were actually doing when the Attorney-General intervened, and what they claimed the right to do, was in contravention of the principles laid down in this House.

As regards the judgment of the learned Lord Justice who thought the action ought to have been dismissed, I most respectfully dissent from it. It seems to me that the illustrations which his Lordship gives, if I may say so with all deference, are somewhat wide of the mark, and they are perhaps open to this

further objection, that they are not required if the question proposed in his judgment is to be accepted as the test question in the case. The question there formulated is this: "Are the defendants really running the omnibuses here in question for the purpose of their railway, and so as to obtain and give facilities for better traffic over their line, or is the omnibus business really an independent business, in which they look substantially to general street traffic?" (1) That, I venture to think, is not the question at all. The question is this: Is the business of omnibus proprietors as the defendants were carrying it on when the action was brought reasonably incidental to their business as authorized by their special Act? The principle to be applied is perfectly clear. The difficulty is all in the application. Hundreds of cases may be suggested where the thing done comes very near the line and may fairly be open to a difference of opinion. Speaking for myself, I cannot see what is to be gained by discussing such cases, real or imaginary, however interesting the discussion may be. Here, I think, the respondents have transgressed the line. It may be that in doing what they wish to do they cannot help it. But that, in my opinion, is no justification for their action. If they wish to extend their undertaking beyond the limits authorized by their charter, the proper course is to apply to Parliament for further powers. In my opinion a matter of this sort is much better left to Parliament. There everybody who has a right to be heard will be listened to, and there the interests of the public will be protected. I venture to think that the Court may place itself in a ridiculous position if it attempts to regulate a commercial enterprise by impossible conditions and elastic and unsubstantial undertakings.

I am of opinion that the order of Warrington J. ought to be restored with costs here and in the Court of Appeal.

Lord James of Hereford. My Lords, I desire to add a few observations. It seems to me that we have to look at the state of circumstances that existed upon December 23, 1905, when the relators instituted this action, and to determine

(1) [1907] 1 Ch. 104.

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whether at that time the allegation which was made that the defendants carried on the business of omnibus proprietors and ran, plied for hire, or worked the omnibuses for the purpose of carrying passengers in the streets of Birkenhead, was or was not proved. Whatever has occurred since by way of modification of the business, I do not think, ought to govern this case at all, and therefore the terms made in the Court of Appeal cannot now be regarded as controlling this action. If by those modifications the defendants have brought themselves within their powers, they needed no undertaking, they wanted no authority; they would raise no cause of action. If they have not done so, they have only maintained the state of things that existed in the month of December, 1905.

Now, my Lords, I am rather anxious to say that I do not think it is the intention of your Lordships in any way to prevent railway companies considering the convenience of their customers, the persons whom they are carrying. No doubt there are certain things incidental to the carriage of passengers which can be done. Of these perhaps that which is most attractive would be the giving of refreshments on the line. That is not, I presume, authorized in express terms by the statutes, but that is incidental to the carriage of passengers. In the same way the meeting of passengers or delivering them at their places of abode, where they wish to go, by an omnibus, may well be carried on without exceeding the statutory powers. But, my Lords, in this case that was not what existed at the time this action was brought. Here, as we see if reference be made to the plan which has been called the "Star" plan, it is proved that the course of the omnibus was to cling, as it were, to the tramways as competitors with the tramways, and to take passengers by these omnibuses who would otherwise have gone by the Birkenhead tramways. It was not confined to dealing with the passengers on the railway; it was an open omnibus business, picking up wherever they could find passengers for the profit of the omnibuses, and not for the convenience of the railway passengers.

Therefore, my Lords, it seems to me that this case is taken outside of all those cases that have been mentioned where,

incidental to the business of the railway company or any other company, business was carried on that was not specially mentioned in the statutory powers, and that this was an independent business that was attempted to be carried on by this company.

My Lords, the danger of accepting the argument of the defendants is, that the natural consequence would be to give a railway company power to carry on a business as a railway company which they never had power to carry on, because, if bringing passengers as feeders to a railway is incidental to that railway company's business, it would not be confined to bringing them by omnibuses; you may bring them by tramways or by tramcars, or by cars moved by locomotive steam power; and that would be simply an extension of the railway. If the railway company could overcome the difficulty of taking land without compulsory powers, if they could take land by agreement, they would be able to bring into existence new railways not authorized by statute, and, I presume, be entitled to impose their own terms and tolls, unregulated by legislative control, if they thought fit. That would be a principle which your Lordships would be very slow to sanction or approve. And I think if the course which my noble and learned friend on the woolsack has moved should be taken is not taken, the result would be to extend the power of railway companies in a most dangerous manner.

LORD ATKINSON. My Lords, I concur. I think the system of omnibus traffic which was in existence at the time this suit was instituted was not reasonably incidental to the carrying out of the undertaking which the railway company was authorized by statute to carry out.

I must say for myself that if the principles which have been relied upon in favour of this practice were to be generally applied, it would seem to me to dispense altogether with the necessity of getting statutory powers for enterprises which should be established in competition with those for which statutory powers had been obtained, provided the former ultimately brought passengers to the station of the railway company. I do not think such projects were ever intended to be protected as

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incidental to the business of a railway company authorized by statute to carry on railway transit, and therefore think they are ultra vires.

Order of the Court of Appeal reversed and judgment of Warrington J. restored, with costs here and in the Court of Appeal: Cause remitted to the Chancery Division.

Lords' Journals, July 9, 1907.

Solicitors: *F. Venn & Co., for Alfred Gill, Birkenhead; Cutler A. Jones.*

[HOUSE OF LORDS.]

H. L. (E.) 1907 *July* 25.

LORD MAYOR, &c., OF LEEDS . . . . APPELLANTS;

AND

RYDER AND OTHERS . . . . . RESPONDENTS.

Licensing Acts—Licensing Justices—Provisional Licences with a view to Compensation—Bias on part of Justices—Qualification of Applicant for Licence—Person keeping or about to keep Alehouse—Beerhouse—Real resident Holder and Occupier—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 1—*Beerhouse Act*, 1840 (3 *& 4 Vict. c.* 61), *s.* 1.

A county borough corporation under statutory powers for the improvement of a district bought land in the borough, including licensed premises, dismantled the premises and put caretakers therein with a view to suppressing unnecessary licensed premises on payment of compensation to the corporation under the Licensing Act, 1904. At the next annual licensing sessions the caretakers, in pursuance of an arrangement between the corporation and the justices, applied for renewal licences, some under the Alehouse Act, 1828, and some under the Beerhouse Act, 1840. The licensing justices provisionally granted renewal licences subject to a reference to quarter sessions, the compensation authority under the Licensing Act, 1904, s. 1. It was contended that the renewals were void because the caretakers were not persons keeping or about to keep alehouses under the Alehouse Act, 1828, or real resident holders and occupiers under the Beerhouse Act,

1840, and because some of the justices who granted the renewals were members of the corporation and parties to the arrangement:—

Held, that, the justices having honestly exercised their discretion and the transaction being bona fide and for the purpose of carrying out the object of the Licensing Act, 1904, the renewals were valid.

Decision of the Court of Appeal, *R.* v. *Woodhouse*, [1906] 2 K. B. 501, reversed, and decision of the King's Bench Division restored.

THE question stated in the head-note arose between the appellants, the corporation of Leeds, and the respondents, who objected to the provisional licences being granted. The circumstances are stated fully in the report of the decisions below, and concisely in the judgment of Lord Loreburn L.C. The King's Bench Division (Lord Alverstone C.J. and Ridley and Darling JJ.) refused to quash the provisional licences. The Court of Appeal (Vaughan Williams, Stirling, and Fletcher Moulton L.JJ.) reversed that decision and quashed the licences. Hence this appeal.

May 1, 2, 6; July 24, 25. *Scott Fox, K.C.*, and *Bairstow*, for the appellants, contended that the arrangement and transaction were entirely bona fide and for the purpose of carrying out the intention of the Licensing Act, 1904, with regard to the payment of compensation in respect of the extinction of unnecessary licences; that the licensing justices, in granting the provisional licences, acted administratively, and exercised their discretion honestly and without bias; that at the hearing the respondents had expressly waived all objections to the presence of those justices who were members of the corporation; and that there was no ground for the issue of writs of certiorari, even if those writs would lie, which was not admitted.

Danckwerts, K.C., and *J. A. Simon*, for the respondents, contended that the justices had no jurisdiction to grant any renewal of the licences or to refer the matter to the compensation authority; that renewals could only be granted to holders of the licences, and that none of the applicants were holders or persons of fit character; that the applicants under the Alehouse Act, 1828, were not persons who had kept or were about to keep licensed houses, and were not qualified under that Act to receive licences; that the applicants under the Beerhouse Act, 1840,

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were not the real resident holders or occupiers, and were not qualified under that Act to receive licences; that the justices had not adjudicated duly or at all, and had merely carried out a prearranged bargain, some being biassed and disqualified from acting; and that the writs of certiorari were rightly granted.

Besides the authorities discussed in the Courts below, reference was made to *Reg.* v. *Powell* (1) and *Sealey* v. *Tandy.* (2)

Counsel for the appellants were not heard in reply.

July 25. LORD LOREBURN L.C. My Lords, the relevant facts in this case, which are extremely few, and the relevant arguments, which also are not of any length, have been admirably stated by Mr. Simon.

It is not necessary to consider any point in regard to the remedy applicable to this case, for in my opinion there is no ground whatever for interfering with what has been done. The justices of a licensing district granted provisional licences to certain nominees of the Leeds Corporation who did not carry on, and did not intend to carry on, the business of licensed victuallers and were mere caretakers, and referred the matter to quarter sessions under s. 1, sub-s. 2, of the Licensing Act, 1904. My Lords, I will not enter upon the circumstances, but this was a step, and a very sensible step, in a proceeding under which the Leeds Corporation, who had bought these licensed premises, wished to have them suppressed upon the terms of receiving compensation. The only purpose was to keep the licences so that compensation should be paid for them; and the respondents object because they say that no compensation ought to be paid at all.

The grounds which they put forward are really three in number. One of them is that the justices of the licensing district had no power to refer these licences, because the renewal of them would be void. They say that, as to public-houses, the renewal would be void, because under the Act of 1828, s. 1, licences can be granted only to persons keeping, or being about to keep, inns, alehouses, or victualling houses, and the licensees in this case were not such persons. The answer

(1) [1891] 2 Q. B. 693. (2) [1902] 1 K .B. 296.

is that although the Act of 1828 does use those words in describing the purpose for which licensing meetings are to be called, it expressly leaves to the discretion of the justices whether they will grant licences or not to persons whom they deem fit and proper persons; so that these licences would not be void if granted.

With regard to beerhouses, the argument is that, as to them also, were licences granted they would be void. Reference is made to the Act of 1840, which requires that the applicant shall be "the real resident holder and occupier" of the house before he obtains an excise licence. And it is said that the Act of 1869 makes it unlawful for justices to grant a certificate or licence under that Act unless the person complies with the requirements of the Act of 1840. I say nothing about the propriety of doing this in general. I do not wish to convey the idea that improper persons in any way ought to be the recipients of certificates; but when granted in these circumstances they are not void. I can find nothing in any Act that so declares.

I will make only one observation with regard to what Mr. Simon said at the conclusion of his argument. I am not to be understood as saying that justices acting under the Act of 1904 would be warranted in shutting their eyes in a good-humoured way to any defects within the description of sub-s. 1 of s. 1. What I do say is that they are not bound to enter in detail upon any such inquiries. If they think in the exercise of their discretion it is a proper case to send forward and to refer to quarter sessions, they are entitled so to act. They must act, of course, honestly, and endeavour to carry out the spirit and purpose of the statute. In this present case I see no ground whatever for saying they were not authorized to refer the applications to quarter sessions under sub-s. 2 of s. 1 of the Act of 1904. That ground entirely fails.

The second ground urged for the respondents was that some at least of these justices were biassed by their having previously taken part in certain arrangements when the corporation offered that these public-houses should be suppressed and compensation paid. The justices acting under s. 1, sub-s. 2, of the Act of 1904 act administratively, for they are exercising a discretion

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which may depend upon considerations of policy and practical good sense—and they must, of course, act honestly. That is the total of their duty. I am quite satisfied that these gentlemen acted honestly in this case, and I very much regret that an objection of this kind is taken after what took place at the hearing before the justices. In my opinion the objection ought never to have been taken. Justices are not able satisfactorily to discharge their duty if the propriety of their sitting and adjudicating is admitted when the case is before them and then is combated in Courts of law afterwards. It is a reprehensible practice.

I see no objection to arrangements being made between owners of public-houses and members of a licensing committee with a view to the suppression of licences under s. 1 of the Act—indeed, I regard that method as among the most obvious and legitimate ways of carrying out the intention of the Act.

My Lords, a third point was made by Mr. Danckwerts at the end of his argument that, in effect, no one except the holder of a licence can apply for a renewal, and in this case the previous holder had gone and there had been no transfer. There is nothing in any Act of Parliament which was cited that supports this contention, and, so far as authority goes, the authority is against it. That argument also may be dismissed.

Accordingly I am of opinion that this appeal must be allowed, and I move your Lordships accordingly.

EARL OF HALSBURY. My Lords, I really have nothing to add. I entirely concur in what the Lord Chancellor has said. The only observation I should make with reference to Mr. Simon's concluding remarks is that upon the facts of this case as they are disclosed here there seems to me to be no objection to what was done. On the contrary, I think there was obviously an honest desire to carry out what the Act of Parliament intended to be done, and no proper objection can be made to it.

LORD MACNAGHTEN. My Lords, I also agree. I think the conduct of the renewal authority, the licensing justices, is not open to objection.

LORD ATKINSON. My Lords, I concur.

EARL OF HALSBURY. My Lords, I ought to add that my noble and learned friend Lord Ashbourne has left with me the duty of saying on his behalf that he entirely concurs in the view we have taken. H. L. (E.) 1907 LEEDS CORPORATION v. RYDER.

Orders of the Court of Appeal reversed, with costs here and below: Cause remitted to the King's Bench Division.

Lords' Journals, July 25, 1907.

Solicitors: *King, Wigg & Co., for Fox, Leeds; Godden, Son & Holme, for Simpson, Thomas & Co., Leeds.*

[HOUSE OF LORDS.]

MORGAN . . . . . APPELLANT; H. L. (E.) 1907 *July* 30.

AND

FEAR AND ANOTHER . . . . . RESPONDENTS.

Light—Prescription—Dominant and Servient Tenements held under Common Landlord—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.

Under s. 3 of the Prescription Act, 1832, where two adjoining tenements are held by different lessees under a common landlord, and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement for a period of twenty years without interruption, he acquires an absolute and indefeasible right to light as against that other tenement, and this right enures in favour of that lessee and his successors not only as against the adjoining lessee, but as against the common landlord, and all succeeding owners of the adjoining tenement.

Decision of the Court of Appeal, [1906] 2 Ch. 406, affirmed.

The doctrine applied in *Frewen* v. *Philipps*, (1861) 11 C. B. (N.S.) 449; and *Mitchell* v. *Cantrill*, (1887) 37 Ch. D. 56, was not affected by *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, and has been too long acted on to be now disturbed.

IN 1825 the corporation of Aberystwyth, owners in fee, demised by deed to Davies the premises now known as Nos. 16 and 18, North Parade, for ninety-nine years. In 1827 the

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premises were severed as to the leasehold interest, and No. 16 came into the possession of Watkins, who surrendered it by a deed of April 30, 1900, to the corporation, and at the same time became their lessee of No. 16, under a fresh lease of May 1, 1900, for seventy-five years. Watkins assigned that lease to persons who granted a sub-lease of No. 16 to the respondents. At the date of the surrender No. 16 had for more than twenty years enjoyed an uninterrupted access of light to two windows over the premises of No. 18. In 1903 the representatives of Davies assigned No. 18 to the appellant, who surrendered her interest therein to the corporation, and became their lessee under a fresh lease. The appellant having raised the height of a wall and interfered with the access of light to No. 16, the respondents brought an action against the appellant. Kekewich J. held that the respondents were entitled to the right stated in the head-note, and this decision was affirmed by the Court of Appeal. The circumstances of the surrender of No. 16 in 1900 raised a question of fact (not material to this report), which was disposed of by Kekewich J. and is fully stated in the report of the decisions below.

July 29, 30. *Warmington, K.C.*, and *L. F. Potts*, for the appellant. The light referred to in s. 3 of the Prescription Act, 1832, is an easement of the same nature as an easement by prescription at common law, and can only be acquired by the owner of the fee of one tenement against the owner of the fee of the other tenement. Therefore no right of light to the respondents' premises over the appellant's premises could be acquired under the Act while both the appellant's and the respondents' premises were held under the same landlord. Secondly, if any right can be acquired under the section as between two termors, both holding for the same term of years under the same landlord, that right is only co-extensive with the term, and would be extinguished on the surrender of the dominant tenement to the common landlord. Therefore all rights of light, if any, which had been acquired at the time of the surrender of the lease in 1900 were extinguished by the surrender. Thirdly, when the corporation granted to Watkins the lease of May 1, 1900, the only title

which the corporation had to No. 18 was in reversion expectant on the determination of the term of ninety-nine years created by the lease of 1825, and a grant, whether express or implied, by the corporation of a right of light over No. 18, to take effect after the determination of the term of ninety-nine years, would be void for perpetuity.

The Prescription Act creates no new right. It only facilitates proof of an already recognised right. The easement acquired, whether by common law prescription or under the Act, is acquired by all who are interested in the dominant tenement against all who are interested in the servient tenement. It cannot, therefore, exist when there is one common owner of both tenements. It is clear that when the Act was passed no such claim as the present could have been successfully asserted. The principle was stated by Lord Ellenborough C.J. in *Daniel* v. *North* (1): "The foundation of presuming a grant against any party is that the exercise of the adverse right on which such presumption is founded was against the party capable of making the grant, and that cannot be presumed against him unless there were some probable means of his knowing what was done against him." That the Prescription Act has made no difference in the law was stated in *Colls* v. *Home and Colonial Stores* (2) by Lord Macnaghten and Lord Davey, and in *Kelk* v. *Pearson* (3) by James L.J., whose language was approved by Lord Selborne in *City of London Brewery Co.* v. *Tennant.* (4) The Act simply gives statutory effect to the common law. Further, the enjoyment must be of the light in the character of easement as distinct from the enjoyment of the land itself: *Harbidge* v. *Warwick* (5), where it was also held that if the dominant and servient tenements are during the prescribed period in the occupation of the same person no right is acquired. The right and enjoyment must be adverse in the strict sense. In *Bright* v. *Walker* (6) it was held that the enjoyment for more than twenty years of a right of way over land in the possession of a lessee for lives holding under the Bishop of Worcester conferred no right

(1) (1809) 11 East, 372.
(2) [1904] A. C. 179.
(3) (1871) L. R. 6 Ch. 809.
(4) (1873) L. R. 9 Ch. 212.
(5) (1849) 3 Ex. 552.
(6) (1834) 1 Cr. M. & R. 211.

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against the Bishop. In *Ladyman* v. *Grave* (1) Lord Hatherley L.C. held that the right of light cannot be acquired by the lapse of time during which the owner or his tenant is also the occupier of the servient tenement. The same principle is indirectly enforced in *Daniel* v. *Anderson* (2), which was a case of a right of way, there being in this respect no difference between rights of way and access of light. *Birmingham, Dudley & District Banking Co.* v. *Ross* (3) (a case of a common owner), *Wheaton* v. *Maple & Co.* (4), and *Kilgour* v. *Gaddes* (5), in which the easement was a right of way, are in the appellant's favour.

The first decision in favour of the respondents' contention is *Frewen* v. *Philipps* (6), and from that date to 1887, when *Mitchell* v. *Cantrill* (7) was decided, there is no authority to the same effect. Those decisions, as well as *Robson* v. *Edwards* (8), are inconsistent with previous cases, and also with the language used in this House in *Colls* v. *Home and Colonial Stores* (9), and ought to be overruled.

If the respondents rely on the lease of May 1, 1900, the answer is that the only title of the corporation was in reversion expectant on the determination of the ninety-nine years' lease granted in 1825, and a grant by the corporation of a right to light to take effect at the end of the term would have been void for perpetuity: *London and South-Western Ry. Co.* v. *Gomm* (10); and see Lewis on Perpetuities, pp. 898, 919. The observations of Wood V.-C. in *Simper* v. *Foley* (11) that an easement against the owner of the leasehold interest in a servient tenement is valid against the world and against the owner of the reversion are founded on a misconception of the statute.

P. O. Lawrence, K.C., and *Dunham*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, in this case there are two questions, one of law, and the other of fact. The question of

(1) (1871) L. R. 6 Ch. 763.
(2) (1862) 31 L. J. (Ch.) 610.
(3) (1888) 38 Ch. D. 295.
(4) [1893] 3 Ch. 48.
(5) [1904] 1 K. B. 457.
(6) 11 C. B. (N.S.) 449.
(7) 37 Ch. D. 56.
(8) [1893] 2 Ch. 146.
(9) [1904] A. C. 179.
(10) (1882) 20 Ch. D. 562.
(11) (1862) 2 J. & H. 555.

law is whether a right can be acquired by a termor over land held by another termor under the same reversion, by virtue of s. 3 of the Prescription Act. This has been decided in the affirmative as long ago as 1861, in *Frewen* v. *Philipps* (1), and the same view was expressly indicated in *Mitchell* v. *Cantrill* (2) in 1887. I think it is accurate to say that rule of law has been acted upon for forty-six years. I cannot advise your Lordships to disturb so well settled a rule.

The question of fact is whether the lease of 1900 was granted with the common intention that the easement—or the inchoate easement—created under s. 3 of the Prescription Act would be suppressed. I think the findings of Kekewich J. negative the conclusion of fact that is urged upon your Lordships by the appellant. The Court of Appeal took the same view, and in my opinion there is no ground for disturbing those findings.

In these circumstances it is not necessary to say anything as to the question raised by the appellant's counsel about perpetuities. It was not argued in the Court below—judiciously in my opinion.

I therefore move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. The only fault in Mr. Warmington's able argument is that it comes too late. *Frewen* v. *Philipps* (1), decided in 1861, has, I believe, been accepted as law ever since, and in my opinion there was nothing said in *Colls' Case* (3) to throw any doubt upon it. I think it is too late to disturb it now.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ROBERTSON. My Lords, I also concur solely and absolutely upon the ground that the law has been so long settled that it is too late to review it. The same reason which induces me to concur in the decision induces me to abstain from any criticism on the merits of the question, supposing it were

(1) 11 C. B. (N.S.) 449. (2) 37 Ch. D. 56.
(3) [1904] A. C. 179.

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now open, because if the law is to be upheld it is also to be respected. Accordingly I abstain from any criticism which would diminish the respect in which that decision is held.

LORD ATKINSON. My Lords, I concur.

LORD COLLINS. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, July 30, 1907.

Solicitors: *Philpot & Morrell, for A. J. Hughes, Aberystwyth; Watkins & Pulleyn, for Hugh Hughes, Aberystwyth.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1907 *July* 24.

THE DUNLOP PNEUMATIC TYRE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE DUNLOP MOTOR COMPANY . . . RESPONDENTS.

Trade Name—Injunction—Similarity of Name.

Previously to the year 1904 two brothers had carried on a small business at Kilmarnock, Scotland, under the style of R. & J. F. Dunlop, the principal business of this firm being that of selling and repairing bicycles, tricycles, and motors. In 1904 the two brothers registered a company called the Dunlop Motor Company with a capital of 500*l*. This company took over from R. & J. F. Dunlop the motor business, and the purposes of the company were the sale on commission and the repairing of motors, motor cycles, and the parts thereof, the actual business consisting principally in executing repairs and selling petrol. The pursuers, the Dunlop Pneumatic Tyre Company, of Regent Street, London, who deal in tyres, pumps, and other adjuncts of motors and other vehicles, sought an injunction to restrain the Dunlop Motor Company from carrying on its business under the name of the "Dunlop Motor Company":—

Held (affirming the decision of the Second Division of the Court of Session), that on the evidence there was no proof that any one would be

misled into thinking that the two companies were the same; and, secondly, that the pursuers had no exclusive use of the name of "Dunlop."

APPEAL against a decision of the Second Division of the Court of Session, Scotland. (1)

The appellants and complainers were the Dunlop Pneumatic Tyre Company, Limited, whose registered offices were at 14, Regent Street, London and the respondents were the Dunlop Motor Company, Limited, having their registered offices at 39, John Finnie Street, Kilmarnock, Scotland. In February, 1905, the appellants sought an interdict against the respondents to restrain them (1.) from carrying on business under the style or title of "The Dunlop Motor Company, Limited," or under any other or similar style or title comprising the word "Dunlop," or any style or title calculated to deceive or mislead the public into the belief that the respondent company was the same company as the appellant company or was in connection therewith, or that the business of the respondent company was the same or in any way connected with the business of the appellant company; and (2.) from passing off or attempting to pass off the respondent company's goods as the goods of the appellant company, and also from issuing or publishing any catalogues, labels, circulars, show-cards, advertisements or bill-heads, or from using any trade name comprising the word "Dunlop" in connection with any goods not manufactured or sold by the appellant company. The appellants alleged (inter alia), in their statement of facts, that the complainers were a limited company incorporated on May 6, 1896. The objects for which the said company was established were (inter alia) as follows: "(*a*) To acquire and take over as a going concern the undertaking of the Pneumatic Tyre Company, Limited (incorporated in 1894), and all or any of the assets and liabilities of that company, and also certain patents." "(*b*) To carry on the business of manufacturers of and dealers in and letters to hire of pneumatic and all other tyres and wheels of cycles, bicycles, velocipedes, and carriages and vehicles of all kinds, and all

(1) (1906) 8 F. 1146.

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machinery, implements, utensils, appliances, apparatus, and things capable of being used therewith, or in the manufacture, maintenance, and working thereof respectively." "(*c*) To carry on the business of manufacturers of, dealers in, and letters to hire of cycles, bicycles, tricycles, velocipedes, perambulators, bath-chairs, horse-carriages, motor or horseless carriages, and carriages and vehicles of every description, and all component parts thereof respectively."

"The patents known as the Dunlop patents, which were owned and worked by the complainers and their predecessors, caused an unprecedented development in the cycle, motor, and carriage industry, in which the complainers and their predecessors had taken a leading part. The complainers did a large business in every part of the United Kingdom, particularly in the manufacture and sale of tyres, pumps, inflators, and other parts and accessories for motors and cycles. They were also manufacturers of motor tyres and wheels and other motor accessories, such as rugs and motor clothing generally."

"Statement 3: In 1888 the word 'Dunlop' was first used by the predecessors in title of the appellants' company to designate the goods manufactured by them. Since that time the word has been in continuous commercial use as designating generally the goods manufactured by them. The appellants did a large business, not only in the manufacture and sale of tyres, but also in the manufacture of all accessories used in relation to motor cars and bicycles and in numerous other goods, rubber and otherwise, used in and about motoring and cycling. These included tyres of all kinds, wheels for motor cars, valves, pumps or inflators for motors, repairing outfits for motor car tyres, india-rubber matting, waterproof clothing, and indiarubber goods of all kinds. All these goods were associated with the name 'Dunlop,' the word 'Dunlop' being stamped on all or most of them. In the case of tyres there was impressed a bust of the inventor, J. B. Dunlop, which formed the trade mark . . . ."

"The respondents were a limited company, incorporated on July 1, 1904. Their purposes, as defined by their memorandum of association, were (inter alia) as follows: '(1.) To acquire the motor branch of the business of R. & J. F. Dunlop, cycle and

motor merchants and manufacturers, Kilmarnock, and with that object to execute and carry into effect a minute of agreement between R. & J. F. Dunlop, cycle and motor merchants and manufacturers, Kilmarnock, and Robert Dunlop and John Fisher Dunlop, the individual partners of the firm, of the first part, and this company, of the second part, a draft whereof has been approved by the subscribers thereto.' '(2.) To carry on the business of motor manufacturers, agents and dealers, and all or any other trades or businesses of any kind which can be conveniently carried on by the company in connection with such business or any part thereof, or the carrying on of which may, in the opinion of the directors, be likely to be beneficial to the company.' '(3.) To manufacture, buy, sell, repair, convert, let on hire, or otherwise deal in motors, cycles, cars, carriages, carts, waggons, vans, and vehicles, and their component parts and accessories, and fittings and conveniences of all kinds which can be conveniently dealt in by the company, and to carry on any other businesses, whether manufacturing or otherwise, which can be conveniently carried on in connection with any of the company's objects.' The respondents carry on business in terms of these purposes, and deal (inter alia) in tyres, pumps, inflators, wheels, rugs, and other parts and accessories of cycles and motors. They were registered and carried on business under the style and title of the 'Dunlop Motor Company, Limited.'"

The respondents alleged (statement 3): "The name 'Dunlop' has been used by the respondents' predecessors (Messrs. R. & J. F. Dunlop) for eight years in connection with the cycle and motor business carried on by them. That firm commenced business in 1897 in premises situated in Bank Place, Kilmarnock, and removed to their present premises at 39, John Finnie Street, in November, 1898, where the firm still continued to carry on the business so far as not acquired by the respondents' company. The respondents' predecessors had been engaged in the motor business (that is, in the dealing in complete motors, cycles, tricycles, and cars, and the repairing of these things) for seven years, and have during that time peaceably enjoyed the free use of the name 'Dunlop' under the firm name of R. & J. F. Dunlop.

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The partners of that firm were and still are the said Robert Dunlop and John Fisher Dunlop."

"Statement 5: The respondents and their predecessors had become identified with the manufacture, sale, and repair of motors and motor vehicles, and the name was of great value to them in this respect. The respondents, as matter of fact, had never used any trade name comprising the word 'Dunlop' in connection with any goods manufactured or sold by them where that name had been applied to any like goods advertised as manufactured or sold by the complainers."

"Statement 7: There were no patents known as the 'Dunlop' patents, and the complainers had never relied upon any patents as being 'Dunlop' patents in any action by them in connection with tyres. Their chief patents were the 'Welch' patents and 'Bartlett' patents. These patents continued to be known by these names alone, although the complainers, it is believed, acquired the property thereof. These patents had now all expired."

A proof was led, and the appellants produced evidence to uphold their statement, that the Dunlop Motor Company was really not much more than a name; that no motor machinery passed under the sale, and no plant except a combined brazing hearth and forge and a vulcanizer; and that beyond these and a few tools, including two lathes and a small quantity of motor accessories, the new company got nothing. In fact, they attempted to prove that the new company had practically no plant, no premises and no stock-in-trade, and had no money by which it could acquire these things, and that whatever business it did was truly the business of Messrs. R. & J. F. Dunlop conducted under a new name. There was very little evidence of any one being misled by the name of the respondent company.

The Lord Ordinary (Lord Dundas) on August 1, 1905, found that the adoption by the respondents in their business of the style or title of "The Dunlop Motor Company, Limited," was an infringement of the appellants' rights, and that such adoption was calculated to deceive the public into purchasing the respondents' goods in the belief that such goods were the goods of the appellants, and into confounding the respondents' business with

that of the appellants, and his Lordship granted an interdict in the terms asked for. The respondents appealed, and on July 20, 1906, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and refused an interdict. (1)

June 11 and 12. *Sir Robert Finlay, K.C.*, and *J. Avon Clyde, K.C.* (the latter of the Scottish Bar), for the appellants. The judgment of the Court below was erroneous. The inference is irresistible that the respondent company was formed with the intention of exploiting the commercial value of the name and reputation of the appellant company. The respondent company covered the same ground; and the object of forming the company was to bring forward the name of "Dunlop." Its use of the name "The Dunlop Motor Company" was an infringement of the appellants' right. As soon as their attention was called to the fact that unwary people might be misled by the similarity of the name it was morally wrong of the respondents to go on using it in such a manner as to mislead those dealing with them. In "*Singer*" *Machine Manufacturers* v. *Wilson* (2) the question was, "Were the advertisements of the defendants calculated to mislead an unwary purchaser of the machines?" Here the evidence proved three cases of mistake. Why had the respondents refused to call their company the "R. & J. F. Dunlop Motor Company"?

It is not necessary to prove or aver fraud to obtain an injunction to restrain the use of a name; it is sufficient to prove a tendency to mislead, and here the respondents were using the title in such a way as to deceive the public and to induce them to believe that they were a business connection of the appellants. [They also cited *Dunlop's Pneumatic Tyre Co.* v. *Dunlop Lubricant Co.* (3); *Madame Tussaud* v. *Tussaud.* (4)]

Upjohn, K.C., and the *Hon. William Watson* (the latter of the Scottish Bar), for the respondents. This House will always set its face against giving a company or an individual a monopoly in a surname. The evidence shewed that the appellants' right to the name was confined to its use in connection with tyres. The

(1) 8 F. 1146.
(2) (1877) 3 App. Cas. 376, 392.
(3) (1898) 16 Rep. Pat. Cas. 12.
(4) (1890) 44 Ch. D. 678.

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respondents did not make tyres, and most of their work was repairs. It could not, therefore, be said they were carrying on the same business. With regard to the non-use of the initials, the respondents desired to keep the R. & J. F. Dunlop name for the cycle branch, and the Dunlop Motor Company for a specific branch, naming it a motor branch. There was no fraud in dropping the initials when the sole purpose was to keep the two businesses distinct; nor was fraud proved by shewing that a careless or stupid customer made a blunder as to the identity of the firm. It is only when a man puts off his goods for sale as the goods of a rival trader that the latter has a case under the doctrine of "passing off": see Fry L.J. in *Turton* v. *Turton* (1), and Lords Halsbury and Herschell in *Reddaway* v. *Banham*. (2)

Sir Robert Finlay, K.C., in reply.

The House took time for consideration.

July 24. LORD LOREBURN L.C. My Lords, the question here is, Ought the respondents to be restrained, in substance, from using the style and name of the "Dunlop Motor Company, Limited," on the ground that it is misleading and enables them to acquire part of the goodwill of the appellants?

I think the pursuers in this case fail upon the facts. It is not necessary to enter into the evidence in detail. In each case it nearly always is a question of fact, as it is here. The real complaint in this case was as to the use of the name "Dunlop." That name is the true name of the two brothers who got up the respondent company. I can see very little proof that any one was misled by its use, and I can see no proof that any article was bought by any one from the respondents in the belief that they were a branch of the appellant company. The two companies do not, to any considerable extent, in fact deal in the same articles, and I see no ground for thinking that the little repairing business in Kilmarnock does or can do any unlawful harm to the appellant company.

I am, therefore, of opinion that this appeal ought to be dismissed.

(1) (1889) 42 Ch. D. 128, 146.

(2) [1896] A. C. 199, 204, 209.

LORD JAMES OF HEREFORD. My Lords, the complainers in this case, the appellants, have by themselves or their predecessors carried on business using the name of Dunlop to designate the goods manufactured and sold by them, and such name was stamped on most of the goods so manufactured. Those goods were principally tyres, and the name of the appellants' company, the Dunlop Pneumatic Tyre Company, so represents. Other goods, accessories used in relation to and on and about motor cars and bicycles, were also manufactured and sold by the appellants.

Previously to the year 1904 two brothers, Robert and John Fisher Dunlop, had carried on a small business at Kilmarnock under the style of R. & J. F. Dunlop. The principal business of this firm was that of selling and repairing bicycles and tricycles. In 1904 a small company with very limited capital was formed under the name of the Dunlop Motor Company for the purpose of selling (on commission) and repairing motors and motor cycles and parts thereof. The business carried on by the respondents' company was a small local trade in Kilmarnock, and consisted principally in the repairs of motor cars and the sale of petrol.

The complainers, the appellants, seek to prevent the respondents' company from carrying on its business under the name of the Dunlop Motor Company, on the ground that the use of such name is calculated to deceive the public into purchasing the respondents' goods in the belief that such goods are those of the appellants.

In my judgment the appellants have failed in making out this contention. They do not allege that they sell motors or any other vehicles, but they do deal in parts or accessories of such vehicles, viz., tyres, pumps, and other adjuncts, and they allege that a confusion may be caused and a belief created that the respondents' company were selling these same portions as being those of the appellants.

Now, in what does the deception consist, and who were the persons deceived? The complainers have no claim to the exclusive use of the name Dunlop. It is a common name in Scotland. The respondents had traded as R. & J. F. Dunlop. The appellants have chosen to announce themselves as the

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Pneumatic Tyre Company preceded by the name Dunlop, and their case seems to be that, having done so, they shut out persons named Dunlop from employing that name in connection with a company at all similar in object to the tyre company. I agree that the objects of the two companies need not be absolutely identical in order to entitle the complainers to relief, but there must be great similarity. In this case I do not think that the measure of similarity established is sufficient, either in the name employed or in the objects of the trade sought to be carried on.

The complainers say, We are a pneumatic tyre company. The respondents represent themselves to be a motor company. Then, as I have said, the tyre company does not sell motors. The motor company appears to do so. If in respect of some minor articles there might be a common production, yet the main objects of the two businesses are different. As to these minor articles, I agree with the view expressed by Lord Kyllachy, that the complainers have not proved that they have any exclusive right in connection with the sale of those articles to the use of the name Dunlop, nor have they proved that the name in question has any special reputation or value in connection with such minor articles.

Then, secondly, who are they who will be deceived by the name used by the respondents? It appears to be admitted that an ordinary business person would not be misled, but it is alleged that the unwary would. Well, of course, there are unwary people in this world, but I think that a man who employs his own name in carrying on his business has the right to regard the people whom he may attract as being capable of exercising and being in the habit of exercising thought; and I cannot differ from the judgment of Lord Low, in which he says: "Any one who took the trouble to think about the matter would see that the respondents' company was a motor company and the complainers' a tyre company. I do not think that the respondents are liable to have their business practically stopped unless they change their name simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers."

Under the circumstances of the case before your Lordships I

do not think that the average citizen of Kilmarnock would be deceived, and I cannot speculate upon the degree of unwariness that would induce the confusion necessary to support the appellants' claim.

It is not without full consideration of the very lucid judgment of the Lord Ordinary that I have come to the conclusion that the decision appealed from is correct, and that therefore this appeal should be dismissed.

LORD ROBERTSON. My Lords, I agree in the judgment of the Lord Chancellor.

LORD COLLINS. My Lords, I am of the same opinion.

Ordered that the appeal be dismissed with costs.

Lords' Journals, July 24, 1907.

Agents for appellants: *John B. & F. Purchase, for Deas & Co., W.S., Edinburgh.*

Agent for respondents: *John Bartlett, for Campbell & Smith, Edinburgh.*

[HOUSE OF LORDS.]

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July 25.

ILONA BARONESS WESSELENYI . . . . APPELLANT;

AND

J. AULDO JAMIESON AND OTHERS (TRUSTEES) . RESPONDENTS.

Succession—Will—Residue of Estate to Heir entitled to succeed to Entail—Lands Disentailed—Intestacy.

The testator directed his trustees to entail his Kintail estate upon a series of heirs specified in a tailzied destination clause, and gave certain beneficial interests in the residue of his estate "to the heir for the time being entitled to succeed under the said deed of entail" upon his attaining the age of twenty-four. On his attaining twenty-one the institute heir of entail took advantage of the Entail Amendment (Scotland) Act of 1848, s. 27, and before any deed of entail had been executed obtained from the Court an order to have the estate of Kintail conveyed to him in fee simple, and he evacuated the tailzied destination, thus destroying the entail; he afterwards died unmarried before attaining the age of twenty-four. The next of kin claimed that, in the circumstances of the entail, the residue had fallen into intestacy:—

Held (affirming the decision of the Second Division of the Court of Session), that the residue did not fall into intestacy, as the will declared that the beneficial interest therein was to go to the heir for the time being under the tailzied destination, and it was not a condition of such heir succeeding to the said interest that he should be in the position of heir of entail of Kintail under a deed of entail.

APPEAL from the decision of the Second Division of the Court of Session, Scotland. (1)

The question in the appeal was whether the testamentary directions of the late Sir James Thompson Mackenzie, of Glenmuick, Scotland, with regard to the residue of his estate, amounting to a very large sum, were still operative, or whether the said residue of the estate fell into intestacy.

The appellant Ilona Baroness Wesselenyi, as administratrix of the personal estate of the deceased third son of the testator, claimed one-fourth share of the residue of the testator's movable estate, or alternatively one-fifth of the total residue, alleging that, in consequence of the disentail of Kintail referred to below, the testator's directions became inoperative, and that the said residue

(1) (1907) S. C. 139.

had fallen into intestacy. The respondents, the trustees of the testator's settlement and codicils, disputed this allegation, claiming to retain and apply the residuary estate for the purposes directed by the testator. The claim of the appellant was also resisted by Sir Victor Mackenzie, and an action of multiplepoinding was raised in 1892 to determine various questions between the relatives, but the above was the only point involved in the appeal. The testator, Sir James Thompson Mackenzie, died on August 12, 1890; he, by his trust disposition and settlement dated January 25, 1883, left his whole heritable and movable estate to the respondents as trustees, and directed them by the twenty-one provisions of the settlement to entail his estate of Kintail, in the county of Ross, "under a deed of strict entail," and also to entail his estates of Glenmuick, in the county of Aberdeen, and Bachnagairn, in the county of Forfar, all in favour of his eldest son Allan Russell Mackenzie, afterwards Sir Allan, whom failing Allan James Reginald Mackenzie, Sir Allan's eldest son, and the heirs male of his body, whom failing the other sons of Sir Allan and the heirs male of their respective bodies, successively in the order of their seniority. But, as stated, this destination was altered by the 9th article of the 4th codicil. The settlement contained (inter alia) the following directions: By the 17th purpose, that, so long as Glenmuick should remain unsold, "the person for the time being entitled to succeed to the said estate of Kintail as heir of entail under the destination hereinafter written" should be entitled to the use and enjoyment of the establishment at Glenmuick. By the 18th purpose, that in the event of any heir for the time being entitled to the estates to be contained in the entail so requesting the trustees, they should sell Glenmuick and Bachnagairn and invest four-fifths of the proceeds in the purchase of a residential estate in Scotland, "which estate so purchased shall be added to the said estate of Kintail and the same shall be included in the disposition and deed of entail," and the remainder to be settled on the heirs called to the succession of Kintail. By the 20th purpose the trustees were to hold the estates till the heir entitled to succeed attained twenty-one; and by the last purpose of his settlement the testator directed that the residue

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of his estate should be settled in such manner as the trustees, acting under the advice of the Lord Advocate for the time, should consider best calculated for securing that "the heirs succeeding to the said estates under the said deed of entail" should have the life rent of the said residue and be excluded from the fee for as long a period as possible. But this last purpose and the 18th were revoked by the 4th codicil. The testator executed various codicils. By his 3rd codicil (which was holograph) he directed his trustees to sell Glenmuick and "to purchase a small property in England, say for about 60,000*l.*, and they may lay out another 15,000*l.* in furnishing the same, and in making any repairs," &c.; he added, "I wish the property so purchased to be a residence for my heirs." In another part of the said codicil he authorized the purchase and furnishing of a leasehold or freehold house in London, and the settlement of it "in the same way as I have directed my estate of Kintail to be settled." By the 4th purpose of the 4th codicil the testator revoked certain provisions in favour of his son Sir Allan, and directed his trustees to pay him an annuity of 4000*l.* By the 8th purpose of the said codicil he revoked the 15th, 18th, and 19th purposes of his settlement, and directed his trustees to sell Glenmuick and Bachnagairn and to invest 60,000*l.* in the purchase of "a residential estate in England," and 15,000*l.* in furnishing the house thereof, and to allow Sir Allan to possess the mansion-house rent free for life and to receive the free rents of such English estate. With regard to the balance of the proceeds, he directed that it should be treated "as part of my personal estate and as such be available for all the purposes of my trust disposition and settlement and codicils and these presents so far as applicable to my personal estate in which expression as used throughout these presents it is my intention to include everything except my estate of Kintail and the estate to be purchased by my trustees in England." By the 9th purpose of the 4th codicil the 21st purpose of the settlement was revoked as regards Sir Allan (the testator's eldest son), and the testator directed that the entail should be granted directly and immediately in favour of Sir Allan's eldest son Allan James Reginald Mackenzie and the heirs male of his body, whom failing to the other son or sons of Sir Allan

successively in their order of seniority and the heirs male of their respective bodies, and whom failing the other heirs specified in the said codicil. By the 10th purpose of the said codicil the testator directed an entail of the English estate directed by the 8th purpose to be purchased "as nearly similar in effect to the entail of my said estate of Kintail, to be executed as provided in my said trust disposition settlement and these presents," as the law of England would permit. By the 11th purpose of the said codicil, which raised the question in the appeal, the testator provided as follows: "And, in the eleventh place, whereas by the last purpose of my said trust disposition and settlement it is provided with reference to any residue of my estate which might remain over, after fulfilling or providing for the complete fulfilment of the whole other purposes and directions thereof, that such residue should be settled or otherwise dealt with by my trustees in such manner as they, acting under the advice of the Lord Advocate for the time should consider best calculated for securing, as far as the law for the time would permit, that the heirs succeeding to the said estates under the said deed of entail should have the life rent of such residue in their order successively, and for securing that the interest therein of the said heirs should be restricted to a life rent and that they should be excluded from the fee for as long a period as possible, all as more fully set forth in the said last purpose of my trust disposition and settlement: And whereas I have resolved to alter my directions with reference to the said residue: Therefore I direct my trustees, after paying all debts, legacies, annuities, and life interests affecting my personal estate, to make payment to the heir for the time being entitled to succeed under the said deed of entail, if and so long as he shall be under the age of twenty-four years, such a sum annually for his education as they in their sole discretion shall consider amply sufficient, my wish and intention being that only such a sum annually should be paid to the said heir as will be amply sufficient for enabling him to be educated at Cambridge (where it would be my wish that he should receive his education) or such other university as my trustees may decide: Declaring that all payments under this direction shall be made to the heir

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personally on his own receipts and for his own sole use and behoof, and it shall not be in the power of any of the said heirs to burden or charge the above provision for their education, nor any of the payments to be made by my trustees under the above direction, nor any other interest whether of life rent or reversion which the said heirs or any of them may acquire in the capital or income of any part of the said residue in virtue of my settlements, all which interests of whatever nature are hereby declared strictly alimentary, and not assignable nor affectable by the debts or deeds of the said heirs, whether before or after they attain majority, nor by the diligence of their creditors, and after implementing and fulfilling all the obligations affecting my personal estate, and all the provisions, purposes, and directions of my said trust disposition and settlement and codicil and these presents, so far as subsisting and unfulfilled at my death, I desire my trustees to hold the residue remaining in their hands and the investments and securities on which the same is placed, and to accumulate the income thereof until an heir for the time being entitled to succeed under the said deed of entail shall attain the age of twenty-four years complete, and on the said heir attaining that age, I direct my trustees to pay over to him for his own absolute use and behoof the sum of 10,000*l.*, and to set aside a sum of 60,000*l.* as a marriage provision for such heir, and in the event of his marriage with the approval of my trustees, they shall settle the sum so set aside either in the marriage contract of such heir, or otherwise in such way and manner as to secure a life interest in the said sum to the said heir, and after his death to his wife in the event of her surviving him; but providing that she shall forfeit her life interest in the said sum, in the event of her marrying again without there being children of her marriage with the said heir then surviving, and after the death of both spouses to secure the capital thereof for the children of the marriage, and so as to provide that in the event of there being no children of the marriage, the said sum shall revert and belong to the person next entitled to succeed under the said deed of entail, and with reference to the remainder of the said residue and accumulations after paying the said sum of 10,000*l.* and setting aside the said sum of 60,000*l.* as aforesaid,

my trustees shall pay over the income thereof to the said heir with power to them in their discretion to lay out and invest the said accumulations of income or a portion thereof in the purchase of a leasehold or freehold house and appurtenances in London, and in furnishing the same for the use of the heir for the time entitled to succeed under the said deed of entail, and my trustees shall settle and secure the said house and appurtenances on the said heirs in succession, in the same manner as they are hereinbefore directed to settle the estate to be purchased by them in England, and any balance of the said residue and of the said accumulations of income which may remain in the hands of my trustees after purchasing and furnishing a house in London as aforesaid shall be applied by them (as far as required) if the heir for the time should desire them to do so, in erecting and furnishing a shooting lodge on my said estate of Kintail, and any balance still remaining over after the above purposes are satisfied, may be expended by my trustees in any way they may consider most beneficial for the heir for the time being entitled to succeed under the said deed of entail; and with these alterations and additions I ratify and confirm my said trust disposition and settlement and codicil."

The estate of Kintail was purchased in 1869, but the testator never resided there. Glenmuick, including Bachnagairn, was purchased in 1870, and the testator built a large mansion-house thereon. In terms of a private Act the trustees were empowered to postpone the sale of these two last-mentioned estates until the heir entitled to succeed to the entail of the estate of Kintail should attain the age of twenty-four years. The private Act also compensated Sir Allan for the postponement of the purchase of an English estate. Glenmuick was still unsold, and no English estate has been purchased. On May 26, 1901, Sir Allan's eldest son, the said Allan James Reginald Mackenzie, attained the age of twenty-one years, and became entitled to call upon the trustees to execute a deed of entail of the estate of Kintail; but he preferred to take advantage of the Entail Amendment (Scotland) Act, 1848, s. 27, and before any deed of entail had been executed he obtained, with the consent of the three next heirs, an order from the Court to have the estate of Kintail

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conveyed to him in fee simple, and this was done in March, 1903. Allan James Reginald Mackenzie died on September 16, 1903, unmarried and without having attained to the age of twenty-four years. He bequeathed the estate of Kintail to his father, Sir Allan Mackenzie. On the death of Sir Allan in August, 1906, the estate of Kintail descended to his eldest living son, the respondent Sir Victor Audley Falconer Mackenzie. This was the next heir called to the succession of Kintail under the 4th codicil, and he on April 6, 1904, executed a disentail of the lands in England to which he might become entitled. The appellant contended that by designating as his residuary legatees "the heir for the time being entitled to succeed under the said deed of entail," the testator made a condition of the residuary clause receiving effect that on the heir's attaining the age of twenty-four he should then be the heir of entail in possession of the entailed estate under the entail, and that the deed of entail referred to was that of Kintail alone; and that, as no heir can now answer the description owing to the disentail of that estate, the residuary directions have failed and the residue fallen into intestacy.

The Lord Ordinary (Lord Johnston) held, January 20, 1906, that the 11th purpose of the 4th codicil did not import, as a condition of such heir taking the said beneficial interest in the residue, that he should be in possession as heir of entail under the deeds of entail directed to be executed, either of the estate of Kintail in Scotland or of the English estates directed to be acquired. His Lordship therefore repelled the claims made by the appellant as for the next of kin. On November 29, 1906, the Second Division of the Court of Session affirmed the Lord Ordinary's interlocutor. (1)

July 25. *James Avon Clyde*, *K.C.*, and *W. Chree* (of the Scottish Bar), for the appellant. In the events which have happened there was an intestacy as to the residue. The 11th purpose of the 4th codicil stated as plainly as could be that the heir of entail who succeeded to the entail of Kintail was to have this residue, and there never could be a person who could answer

(1) (1907) S. C. 139.

to the description, because Kintail had been disentailed and had passed as a fee simple estate: see *Inglis* v. *Gillanders* (1); *Schank* v. *Schank*. (2)

William Campbell, D.F. (with him the *Hon. William Watson*), for the respondents, was not called upon, but he asked for the costs of Sir Victor Mackenzie as well as those of the trustees, he being a party to the appeal, although not separately represented.

LORD LOREBURN L.C. My Lords, the point in this case is a very short point, and it is this. There is a direction in the 4th codicil of this deceased gentleman, to the following effect: "I direct my trustees after paying all debts legacies annuities and life interests affecting my personal estate to make payment to the heir for the time being entitled to succeed under the said deed of the entail" of certain sums of money. The question is whether those words mean the heir who shall in fact have title by virtue of the deed, or the heir whom the deed designates as the person entitled to succeed. I agree with the decision of the Second Division that under this language you have to ask who is the person whom the deed declares to be the heir. It is a question of what the deed says, not what the deed does, and so, although it is no longer operative, it can still indicate the heir pointed to in the codicil.

My Lords, in regard to the question of costs, I do not perceive at your Lordships' Bar any appearance on behalf of Sir Victor Mackenzie. Therefore I move your Lordships that this appeal be dismissed with costs in the ordinary way.

LORD MACNAGHTEN. My Lords, I agree.

LORD ROBERTSON. My Lords, the respondent Sir Victor Mackenzie is unquestionably the person entitled to this residue if the entail of Kintail still subsisted.

The proposition maintained by the appellant really is this, that the testator's intention to give this residue to Sir Victor, his lineal descendant, was subordinate to his intention to give it to an heir of entail, and that, as the entailed title has gone by

(1) (1895) 22 R. 266.

(2) (1895) 22 R. 845.

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the board, the testator has expressed no intention applicable to the situation. It seems to me that this is to erect out of words of style a structure of intention wholly non-existent. The testator was dealing with what he was making an entailed estate, and he therefore calls the persons whom he is benefiting heirs of entail. But the substance of a bequest of residue is the choice of persons; and Sir Victor is the designated person in the present case.

On the question of costs, I have only to say that I can see no ground at all for granting the appellant costs out of an estate which we hold to be determined by this will as the effective instrument, his whole argument being that the will has no application to the case in hand. As to the position of Sir Victor, I entirely concur with what my noble and learned friend on the woolsack has said.

LORD ATKINSON. My Lords, I concur.

Ordered that the appeal be dismissed with costs.

Lords' Journals, July 25, 1907.

Agents for appellant: *Busk, Mellor & Norris, for Mackenzie, Innes & Logan, W.S., Edinburgh.*

Agents for respondents: *Norton, Rose, Barrington & Co., for Tods, Murray & Jamieson, W.S., Edinburgh.*

[PRIVY COUNCIL.]

COMMISSIONER OF STAMP DUTIES . . APPELLANT;

AND

SALTING AND ANOTHER . . . . . RESPONDENTS.

J. C.*
1907
June 18; *July* 22.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Stamp Duties Act, 1898—*Probate Duties (Amendment) Act*, 1899—*Share of deceased Partner—Business carried on in the Colony.*

The share of a deceased partner is situate where the business was carried on at the time of his death.

In re Ewing, (1881) 6 P. D. 23, approved.

Where two brothers residing in England carried on the business of graziers and sheep farmers in partnership by their agent in New South Wales:—

Held, that the interest therein of one of them at the date of his death was liable to pay the duties imposed by the New South Wales Stamp Duties Act, 1898, as amended by the Probate Duties (Amendment) Act, 1899.

APPEAL from an order of the Supreme Court (July 24, 1906), upon a case stated under s. 18 of New South Wales Act No. 27 of 1898 by the Commissioner of Stamp Duties.

The question in the appeal was as to the liability, under the circumstances stated in their Lordships' judgment, to probate duty of the interest of W. S. Salting, deceased, in a sheep farming station and property in New South Wales carried on by the deceased and his brother, the respondent George Salting. By s. 49, sub-s. 1, of the said Act, duties are "charged and chargeable upon and in respect of all estate, whether real or personal, which belonged to any testator or intestate dying after the commencement of the Act."

The Commissioner was of opinion that the interest of the deceased was a half-share, and of the value of 100,043*l.*, and that his estate was chargeable in respect thereof with a duty of 10 per cent., which the respondents, as representing the estate, paid under protest.

The Supreme Court (Darley C.J. and Cohen J., Pring J.

* *Present:* THE LORD CHANCELLOR, LORD ASHBOURNE, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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dissenting) held that the assessment of the Commissioner was erroneous, and ordered him to repay to the respondents the amount received by him.

The Chief Justice observed with reference to the business in question, which was undoubtedly a New South Wales business, that "it was contended on behalf of the executrix and executor that upon the death of the testator his share of the partnership assets became forthwith vested in the surviving partner, and that the interest which the testator had in his lifetime in the partnership was by his death changed into an equitable chose in action, the sole right of the executrix and executor being to demand as against the surviving partner an account, and if necessary a sale by the surviving partner of the partnership assets and payment of what, on taking such an account, should appear to be due to the representatives of the testator. If this latter be the correct view, then it is contended that as the testator was at the time of his death domiciled in England, where the surviving partner resides, and where the executrix and executor also reside, the chose in action was bona notabilia in England, and was not bona notabilia within the State of New South Wales. They contend that, within the meaning of the 43rd section of the Partnership Act, 55 Vict. No. 12, nothing remains to them but a debt due by the surviving partner. That section, so far as it refers to the death of a partner, is as follows: 'Subject to any agreement between the partners, the amount due from surviving partners to the representatives of deceased partners in respect of the deceased partners' share is a debt accruing at the date of the death.'"

The case of *Commissioner of Stamps* v. *Hope* (1), he said, decided that the locality of a specialty was where the specialty is found at the time of the creditor's death. The above Act of 1898, s. 51, provided that duties might be levied in respect of specialty debts, notwithstanding that they were not at the time of the death bona notabilia within New South Wales. Simple contract debts were not affected by the Act. The Chief Justice then referred to *Knox* v. *Gye* (2) and *Taylor* v. *Taylor* (3), and held as follows: "In this case the surviving partner resides in

(1) [1892] A. C. 476.
(2) (1872) L. R. 5 H. L. 656, at p. 675, 678.
(3) (1873) 28 L. T. 189, 190.

England. The representatives also reside there. The proper forum for determining the rights of the parties is English. The asset is really an equitable chose in action recoverable in England. It is an English, and not a New South Wales, asset, and is accordingly bona notabilia in the former and not the latter jurisdiction: see *In re Smythe*." (1)

Wise (*K.C.* of New South Wales) and *Vaughan Hawkins*, for the appellant, contended that the deceased partner's share in the station property and business situate and carried on in New South Wales was an asset of the deceased locally situate in that Colony. It was part of the "estate, real or personal, which belonged to him" within the meaning of s. 49, sub-s. 1, of the Stamp Duties Act, 1898. Its locality at the date of death was in the Colony. The locality of the asset which now belongs to the executors is immaterial. The testator's share in the business belonged to him at his death, and is dutiable under the Act. That liability to pay duty is not affected by any consideration as to what became of the asset by transmission after his death. The case is governed by *Beaver* v. *The Master in Equity* (2), which affirmed the decision of the Supreme Court of Victoria in *In re Philip Falk*. (3) As to the rights of the representatives of the deceased partner and the locality of the asset in question, reference was made to *Knox* v. *Gye* (4); *West* v. *Skip* (5); *Bourne* v. *Bourne* (6); *Laidlay* v. *The Lord Advocate* (7); *Walsh* v. *Reg.* (8); *Taylor* v. *Taylor* (9); *In re Smythe* (1); Dicey's Conflict of Laws (1896 ed.), pp. 321, 324.

Austen-Cartmell (*Danckwerts, K.C.*, with him), for the respondents, contended that the Supreme Court was right, and that the Commissioner had erroneously assessed the duty in question. On the death of the deceased the whole of the partnership assets became vested in the surviving partner. The sole right of the respondents as representatives of the deceased was to demand against the survivor an account, and, if necessary, a sale by him

(1) [1898] 1 Ch. 89.
(2) [1895] A. C. 251.
(3) (1892) 18 Vict. L. R. 589.
(4) L. R. 5 H. L. 676.
(5) (1749) 1 Ves. Sen. 239, 242.
(6) [1906] 2 Ch. 427, 432.
(7) (1890) 15 App. Cas. 468.
(8) [1894] A. C. 144, 147.
(9) 28 L. T. 189, 190.

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of the partnership assets, and payment of what might be due as the result of the account. The amount so found due is a simple contract debt by the surviving partner accruing at the death of the deceased. The deceased and his representatives were all domiciled in England, and accordingly the debt was bona notabilia in England, and not bona notabilia in New South Wales This debt was what passed to the executors; it gave a right against a person, and not as against property, and it was locally situated in the country of domicil. Reference was made to *Bourne* v. *Bourne*. (1)

Counsel for the appellant were not heard in reply.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellant in this case is the Commissioner of Stamp Duties of the State of New South Wales. The respondents are the executrix and executor of the will and codicil of William Severin Salting, who died on June 23, 1905.

William Severin Salting and his brother, the respondent George Salting, both resided in England. But they were partners in equal shares, though without any written agreement of partnership, in the business of graziers and sheep farmers, carried on by their agent on a station known as Cunningham Plains, in the State of New South Wales. The assets of the partnership consisted of lands, live stock, and other property of the aggregate value of 200,086*l.* 0*s.* 9*d.*

The duties imposed upon the estates of deceased persons by the Stamp Duties Act, 1898, of New South Wales as amended by the Probate Duties (Amendment) Act, 1899, are "charged and chargeable upon and in respect of all estate whether real or personal which belonged to any testator or intestate dying after the commencement of" the "Act."

The Commissioner was of opinion that the testator's interest in the partnership was a half-share, and therefore of the value of 100,043*l.*, and he considered that this sum should be added to the value of the estate shewn in the affidavit and inventory lodged upon the application for resealing the probate granted to the respondents in England, making in all the sum of 311,343*l.*

(1) [1906] 2 Ch. 427, 432.

The Commissioner assessed duty on that sum. The duty at the prescribed rate of 10 per cent. amounted to 31,134*l.* 6*s.* The respondents paid the full amount claimed, but under protest, contending that the interest of the testator in the partnership was an asset to be dealt with in England, and not liable to duty in the State of New South Wales.

On appeal to the Supreme Court the contention of the respondents was upheld by Darley C.J. and Cohen J., Pring J. dissenting, and the Commissioner was ordered to refund 10,004*l.* 6*s.*, the amount of duty paid in respect of the testator's share in the partnership.

Their Lordships agree with Pring J., who held that the case was covered by the decision of the House of Lords in *Laidlay* v. *The Lord Advocate* (1), and the opinion of this Board in *Beaver* v. *The Master in Equity*. (2) In both those cases it was laid down that the question to be determined was the local situation of the asset, and that the share of a deceased partner in a business was situate where the business was carried on. All the arguments on which the majority of the Supreme Court relied were advanced in the case of *Laidlay* v. *The Lord Advocate* (1), and either ignored or overruled. No doubt in each of those cases there were special circumstances not to be found in the present case, on which more or less reliance was placed. But the broad rule approved was that enunciated by Sir James Hannen in *In re Ewing* (3), that the share of a deceased partner is situate where the business was carried on at the time of the death. In the present case, though both partners resided in England, there can be no doubt that the business at the time of Mr. Salting's death was carried on in New South Wales.

Their Lordships, therefore, will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Supreme Court reversed with costs, the Commissioner's assessment confirmed, and the amount paid by the Commissioner under the order of the Supreme Court refunded with interest.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Light & Fulton.*

Solicitors for respondents: *Flower & Flower.*

(1) 15 App. Cas. 468. (2) [1895] A. C. 251.
(3) 6 P. D. 23.

[PRIVY COUNCIL.]

J. C.* 1907 July 2, 31.

DUMPHY . . . . . PLAINTIFF;

AND

MONTREAL LIGHT, HEAT AND POWER COMPANY . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Quebec Act 1 *Edw.* 7, *c.* 66, *s.* 10—*Construction—Negligence in exercising Statutory Powers—Evidence.*

A derrick used in putting up a house in one of the streets of Montreal was brought into contact with the overhead wires of the respondent company, with the result that a current of electricity was diverted to the street and killed the appellant's husband :—

Held, that the respondents, being authorized by Quebec Act 1 Edw. 7, c. 66, s. 10, in the alternative to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident.

APPEAL by special leave in forma pauperis from a judgment of the Court of King's Bench (November 27, 1905), reversing a judgment of the Court of review (June 27, 1905) and dismissing the appellant's action. The verdict upheld by the Court of review was for $8000 damages in favour of the appellant personally and as tutrix to her minor children.

The claim to damages arose in this way. On October 3, 1903, while a workman named Prevost was operating a derrick to raise a stone, the arm of the derrick either came in contact with or in such close proximity to the overhead transmission line of wires, eighteen in number, eighteen inches distant from each other, but each one carrying a current of very high intensity, as to permit the electricity to escape down the wire cable of the derrick and thereby to shock and render him unconscious. The contractor's foreman (Parent) and James Curtis (appellant's husband), who was a mere passer-by in the street on his way

* *Present:* LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, SIR HENRI ELZÉAR TASCHEREAU, and SIR ALFRED WILLS.

home to dinner, and had nothing to do with the work in question, saw that Prevost was in difficulty. Parent and Curtis rushed to his assistance, and were both instantly killed. Prevost, who received the original shock, recovered consciousness after some hours, and was a witness at the trial.

There was evidence that he was standing on wood, and his escape was said to be due to that fact. The day was dry, and dry wood is an insulator and protects against an ordinary current, but it does not protect from the static effect of the current carried through this transmission line. Electricity seeks to reach the earth, and it was not necessary for the wire cable of the derrick to come in contact with the electric wires, as a current of high intensity will jump across an appreciable intervening space, more or less distant, to reach a conducting medium of any kind by which it may escape to the earth. An expert witness of the respondents testified at the trial that electricity of the intensity carried by these wires will jump across an intervening space of an inch and carry the body of the current with it.

On December 19, 1903, appellant personally, and in her quality of tutrix to her minor children, instituted a joint and several action in the Superior Court, district of Montreal, province of Quebec, against the firm of O. Martineau & Son, the contractors, and the company respondent, to recover damages for the death of her husband.

Various grounds of negligence were alleged against the company—that the carriage of electricity by the transmission line in question from the generating to the transforming station was especially dangerous; that to ensure even a moderate degree of safety to the lives of citizens it was necessary that the electricity should be conducted through wires which were insulated and conveyed currents of only moderate intensity or voltage; that such wires should be protected by guard wires; that through overhead wires which were dangerously close to the street the company conducted currents of such high intensity as to be a constant danger to life; that the company was guilty of gross fault in transmitting currents of such intensity through overhead wires instead of placing such wires underground; that, although

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well aware of the constant danger to the public in transmitting such dangerous currents through overhead wires, the company failed to insulate the said wires, provide guard wires, or take any precaution whatever to prevent the escape of electricity; that the death of Curtis was due to the want of precaution and skill and the gross fault of the company.

It was charged against Martineau & Son (the contractors) that they were negligent in permitting their derrick to come in contact with the wires of the company respondent. The verdict of the jury exculpated them and was not questioned in this appeal.

The Court of review said: "The finding of the jury (which we think should be sustained) was that the death was caused through electricity which was improperly and unlawfully run in the way the company ran it over the public streets, instead of underground, as they might have done, or upon insulated wires, as the jury found they might have done, or without affording any protection in the way of guard wires or otherwise to prevent contact between objects which might be lawfully on the street and the wires of the company." The literal answer of the jury to the question in what did negligence consist, was "in not exercising due diligence in protecting the public safety in not placing the wires underground instead of overground—and in making no attempt to insulate the wires or put guard wires around them."

The Court of King's Bench set aside the verdict, holding that by the Act 1 Edw. 7, c. 66, the company had two methods at its disposal of placing its wires, viz., overground or underground, and, even assuming one was very dangerous and the other was perfectly safe, it could exercise its own option and choose the dangerous method, no matter what the result might be to the public, and consequently that a verdict finding negligence on this ground was bad in law.

Ferguson, K.C., for the appellant, contended that this judgment should be reversed and the verdict of the jury upheld. The respondents chose to carry on their operations in a dangerous way, while they were bound to exercise their powers in a reasonable and prudent way. The jury found that they had been guilty of

negligence. There was evidence to sustain that verdict, which was approved by the trial judge and the Court of review. The respondents were bound to establish that they could not discharge their duties or exercise their powers under the Act without infringing the rights of the deceased to protection for his life and limbs. On the contrary, they exercised a permissive power, and were liable for infringement of private rights: see *Metropolitan Asylum* v. *Hill* (1); *Canadian Pacific Ry. Co.* v. *Parke* (2); *Geddis* v. *Proprietors of Bann Reservoir.* (3)

R. C. Smith, K.C., for the respondents, contended that the finding as to negligence by them was against the weight of evidence, and could not be upheld. They had bona fide, and in the interests of their undertaking, exercised their statutory powers in the manner authorized, and had no responsibility for the accidental consequences. As to the verdict being against the weight of evidence, that would only be ground for ordering a new trial: see Code of Civil Procedure, s. 508. He referred to *London and Brighton Ry. Co.* v. *Truman* (4); *Westminster Corporation* v. *London and North Western Ry. Co.* (5)

Ferguson, K.C., replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON. Although there is a very voluminous record in this case, the facts are of singular simplicity. A building contractor used a derrick in putting up a house in one of the streets of Montreal. His workmen brought the derrick into contact with the overhead wires of the respondents, with the result that a current of electricity was diverted to the street and killed the husband of the appellant. On the face of the case, it is manifest that the causa causans of the casualty was the action of the persons using the derrick; and the question is whether the causa sine qua non, in the electric wires, was there owing to the fault of the company using the electricity.

The company derives its powers from an Act of the Quebec Legislature (1 Edw. 7, c. 66), by which they are authorized

(1) (1881) 6 App. Cas. 193.
(2) [1899] A. C. 535.
(3) (1878) 3 App. Cas. 430, 456.
(4) (1885) 11 App. Cas. 45.
(5) [1905] A. C. 426.

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(s. 10) "to enter upon and construct under or over the streets and public highways" of Montreal "all such pipes, lines, conduits, and other constructions as may be necessary for the purposes of its business, all such work to be performed under the directions of the municipality in which the works are situated, provided that the company be responsible for all damages which it may occasion."

Now the main argument of the appellants is that construction overhead instead of underground was of itself negligence, their alternative argument being that the respondents made no attempt to insulate the wires or put guard wires round them. This, on both points, was the decision of the jury; and although in the action before them the owners of the derrick were also defendants, the jury negatived negligence on their part and found the respondents alone liable on the grounds stated.

The proposition in law laid down at the trial was that the respondents, having alternative powers to place their wires either overhead or underground, were bound to adopt whichever method afforded the greatest protection to the public, and were guilty of negligence if they failed to do so. The Court of review, before whom the case was next brought, adopted this proposition and gave judgment against the respondents. On an appeal to the Court of King's Bench this judgment was reversed, and the appellant's action was dismissed. The result is the present appeal.

The voluminous evidence and elaborate pleadings contain little which purports to discriminate this street from streets in general, as regards the danger or safety of overhead wires. Accordingly the proposition maintained is the somewhat bold one that, the Legislature having authorized in these streets of Montreal overhead wires as well as, and just as much as, underground wires, the respondents are guilty of negligence in exercising one of these alternative powers. To their Lordships it seems impossible to support this contention. There are various decisions pretty directly in point. But it is never desirable to rest on the authority of other decisions what is the plain reading of a statute.

The second ground, upon which negligence has been found,

exhibits with singular frankness the essential defect of the appellant's case on this second head. The finding is not that insulating the wires or guard wires was an efficient remedy which would have prevented the accident and which the respondents were negligent in not adopting. On the contrary, the verdict assumes that it is an open question whether what the jury suggest would have done any good at all. Their complaint is that the respondents did not experiment on the efficacy of such arrangements. It is impossible to regard this, in the absence of substantive and affirmative evidence, and in view of the adequate support received by the respondents from their witnesses, as a good ground of liability on negligence.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the judgment of the Court of King's Bench affirmed.

As the appellant appeals in forma pauperis, there will be no order as to costs.

Solicitors for appellant: *Lawrence, Jones & Co.*
Solicitors for respondents: *Ingle, Holmes, Sons & Pott.*

[PRIVY COUNCIL.]

J. C.*
1907
July 3.

In re FRIEZE-GREEN'S PATENT.

Under the Patents Act, 1883, the Board has no power to entertain a petition for extension where there has not been any advertisement as prescribed by s. 25, sub-s. 1. It has no power to dispense with the express provisions of a statute.

THIS was an application by the patentee in person for liberty to prosecute his petition for extension notwithstanding that he had inadvertently omitted to advertise, as required by the rules.

The judgment of their Lordships was delivered by

LORD ROBERTSON. It is not within the competency of this Board to entertain a petition for extension when there has not been any previous advertisement. In s. 25, sub-s. 1, of the Patents Act, 1883, the words are, "A patentee may after advertising in manner directed by any rules made under this section." The Board has occasionally—as in the case of *Lindon's Patent* (1), where, before any rules had been made under the Act of 1883, their Lordships allowed the advertisements required by the old rules to be inserted after the petition had been presented—made relaxation, in very special circumstances, of some of the provisions of the rules, but if their Lordships were to do what they are now asked to do, they would be dispensing, not with rules, but with the statute. The application must be refused.

* *Present:* LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, and SIR ALFRED WILLS

(1) (1897) 14 Rep. Pat. Cas. p. 643.

[PRIVY COUNCIL.]

TILONKO . . . . . APPELLANT; J. C.*

AND 1907

THE ATTORNEY-GENERAL OF THE COLONY OF NATAL . . . . . RESPONDENT. *July* 5.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Practice—Special Leave to Appeal.

Special leave to appeal refused where the question raised had been settled by an Act of the Colonial Legislature.

THIS was a petition for special leave to appeal from a judgment of the Supreme Court, dated April 30, 1907, dismissing the petitioner's application, which questioned the legality of his detention in the Criminal Central Gaol at Pietermaritzburg. It stated that the respondent put in evidence a certificate of the Governor of the Colony under the Indemnity Act, 1906, that the petitioner was detained under sentence passed by a court-martial and confirmed by the Governor, and that such sentence and punishment came within s. 6 of the said Act. The Act provided that the certificate should be conclusive evidence as to the facts therein stated.

Jellicoe, for the petitioner.

Hansell, for the respondent.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. Their Lordships are unable to advise His Majesty to grant special leave to appeal in this case. The question raised is settled by an Act of Natal, and it is not within the power, or within the province, of this Board to discuss or consider the policy or expediency or wisdom of an Act, or to do anything beyond deciding whether the Act applies. Their Lordships are of opinion that the Act applies, and they are bound by it and must give effect to it.

* *Present:* THE LORD CHANCELLOR, EARL OF HALSBURY, LORD ASHBOURNE, LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

J. C. 1907 TILONKO v. ATTORNEY-GENERAL OF NATAL.

In the circumstances of this case their Lordships think that the petitioner ought to pay the costs of the Attorney-General of Natal.

Solicitors for petitioner: *Helder, Roberts, Walton & Giles.*
Solicitors for respondent: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

J. C.* 1907 July 4, 22.

McGREGOR . . . . . DEFENDANT;

AND

ESQUIMALT AND NANAIMO RAILWAY COMPANY . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British Columbia—Vancouver Island Settlers' Rights Act, 1904—*Construction—Powers of Local Legislature—British North America Act, s.* 92, *sub-s.* 10.

The British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit.

By an Act of the same Legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1884:—

Held, that the Act of 1904 on its true construction legalized the grant thereunder to the appellant, and superseded the respondents' title.

Held, also, that the Act of 1904 was intra vires of the local Legislature. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and affected a work and undertaking purely local within the meaning of s. 92, sub-s. 10, of the British North America Act.

APPEAL from a judgment of the Full Court (July 31, 1906), reversing a judgment of Martin J. (December 29, 1905), which had dismissed the respondents' action.

* *Present:* LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, SIR HENRI ELZÉAR TASCHEREAU, and SIR ALFRED WILLS.

The questions decided were as to the validity and meaning of an Act of the Legislature of the province of British Columbia, known as the Vancouver Island Settlers' Rights Act, 1904, and as to the effect of a Crown grant in fee simple made thereunder on May 31, 1904, in favour of the appellant.

The respondents claimed to be entitled in fee simple to the coal and minerals in, upon, and under the lands in suit, and sued for a declaration that no right, title, or interest therein passed to the appellant under his said grant.

The respondents' title was founded on British Columbia Act 47 Vict. c. 14 and Dominion Act 47 Vict. c. 6, relating to the construction of the respondents' railway, and the grant to the respondents pursuant thereto dated April 21, 1887.

The appellant by his statement of defence alleged that in 1879 he entered on the said land, and that he was entitled thereto as a pre-emptor under the Land Act (of British Columbia) then in force, and alternatively that he was a "settler" within the meaning of the Vancouver Island Settlers' Rights Act, 1904, and that he was entitled to the said land and minerals under the said grant of 1904.

The nature of the controversy between the parties is fully stated in the judgment of their Lordships.

Martin J. held that the appellant was a "settler" within the meaning of the Act of 1904, and that the said Act was within the powers of the Legislature of British Columbia, inasmuch as the British North America Act, 1867, s. 92 sub-s. 13, confers an exclusive power upon the provincial Legislatures to make laws in relation to "property and civil rights in the province," and that consequently, by the combined effect of the Provincial Act of 1904 and the Crown grant of May 31, 1904, the appellant's title was valid.

The Full Court reversed this decision. The Chief Justice said with reference to the Settlers' Rights Act of 1904 "that the Legislature considered that there may be persons who have a valid claim to lands within the belt, but who are unable to assert their rights by reason of poverty or limited means; that it decided to enable such rights, if any, to be effectively asserted by authorizing the issue of Crown grants in fee, which would, of

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course, transfer any interest left in the Crown, and which would throw the onus of the litigation on the company while the rights, if any, of the grantee are to be upheld and maintained by the province.

"There is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown or attempts to deprive the company of any interest vested in it under its patent from the Dominion, and we must, of course, impute a rational and beneficial intention to the Legislature rather than an irrational and injurious intention."

He held that, whatever the intention of the Act, so far as the defendant was concerned, the grant on which he relied was inoperative, as there was no interest left in the Crown to convey.

Sir R. B. Finlay, K.C., and *Hamar Greenwood* (*J. A. Simon* with them), for the appellant, contended that the judgment of Martin J. was right and ought to be restored. The Act of 1904 was within the powers of the provincial Legislature of British Columbia: see British North America Act, 1867, s. 92, sub-s. 10. It could not be contended that that Legislature had been deprived by its own Act, 47 Vict. c. 14, of the power to repeal or modify the same by subsequent legislation. The appellant is a settler within the meaning of the Act of 1904, and by the combined effect of that Act and the grant made thereunder he has a good title to the land in suit and to the coal and other minerals beneath it, a title which supersedes or defeats any claim which the respondents might otherwise have had thereto. Reference was made to *Hoggan* v. *Esquimalt and Nanaimo Ry. Co.* (1) as to the meaning of the term "settler."

Luxton, K.C., and *Rowlatt*, for the respondents, contended that on May 31, 1904, the date of the grant to the appellant, and on February 10, 1904, the date of passing the Act of 1904, the Government of British Columbia had no estate or interest whatever in the lands in suit, and that nothing passed by that grant. At those dates the lands, including coal and minerals, were vested in the respondents under the Dominion grant of April 21, 1887, in fee simple, subject as to the surface to any rights which the

(1) [1894] A. C. 429.

appellant might have under 47 Vict. c. 14, s. 23, and 47 Vict. c. 6, s. 7, which rights are not now in question. The Act of 1904 on its true construction does not divest the respondents of their title under their grant to the coals and minerals. Power to deal with the land had been alienated by the province. It was granted by the provincial Government to the Dominion Government by the provincial statute 47 Vict. c. 14. It was thereupon held by the Dominion Government in trust to be appropriated as the Dominion Government should think fit. The Dominion Government thereupon appropriated and granted the said land and coal and minerals thereunder to the respondents in fee simple. It did so as a subsidy for the construction, equipment, maintenance, and operation of the respondents' railway and telegraph line. It was contended that such appropriation and grant could not be repealed or varied except by the Dominion Parliament. So far as the Act of 1904 purported to affect lands which the province had by provincial statute granted to the Dominion, it was ultra vires of the provincial Legislature. The tract of land which included the land in suit was granted to the Dominion in trust for the construction of a railway under the eleventh paragraph of the Forms of Union of the Dominion and the province; and an agreement in 1883 between the two Governments provided for the grant, the incorporation of certain persons to be designated by the Dominion for the construction of the railway, and for a contribution by the Dominion thereto.

Sir R. Finlay, K.C., replied.

1907
July 22.

The judgment of their Lordships was delivered by

Sir Henri Elzéar Taschereau. This is an appeal from the Supreme Court of British Columbia.

The respondents, a company incorporated by an Act of the Legislature of the province of British Columbia, claimed by their action the title to a certain lot of land in that province, including all mines and minerals therein and thereunder, under a grant to them in 1887 by the Dominion Government. The appellant, in answer to the action, claimed the title to this same lot in fee simple in virtue of a grant to him in 1904 by the British Columbia Government, issued under the provisions of an Act

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of the Legislature of the province entitled "The Vancouver Island Settlers' Rights Act, 1904."

The only controversy between the parties is as to the right to the mines and minerals in the said lot. The respondents, in their statement of claim, admit the appellant's right to a conveyance of the surface rights thereof.

The salient facts of the case, as far as necessary for the solution of the controversy between the parties in the view their Lordships take of it, may be summarized as follows:—

On December 19, 1883, the British Columbia Legislature passed an Act (47 Vict. c. 14) granting to the Dominion Government in aid of the construction of the respondents' railway a certain area of land embracing the lot in dispute between the parties.

On April 21, 1887, the Dominion Government, under the provisions of an Act of Parliament passed in April, 1884, granted the said land to the respondents, with certain reservations as to surface rights which, as previously stated, are not in question here.

The appellant's contention is that this grant by the Dominion Government to the respondents must be deemed to have been cancelled by the aforesaid grant to him by the British Columbia Government. The respondents, on the other hand, contend that the grant to the appellant did not divest them of their title to the property.

The action was tried by Martin J., who upheld the appellant's contentions and dismissed the respondents' action. On appeal the Full Court reversed Martin J.'s decision and maintained the action on the exclusive ground that the British Columbia Act of 1904 did not authorize the grant of the said lot to the appellant, and, consequently, that the said lot, notwithstanding the said grant, remained the property of the respondents under the grant to them by the Dominion Government. The appellant has to concede that, but for the British Columbia Act of 1904 and the grant to him under its provisions, the respondents' title to the mines and minerals in question would be incontrovertible, so that the only questions for determination on this appeal are, first, Did the Act of 1904 and the grant to the appellant under its

provisions have the effect of superseding the respondents' title under the grant to them by the Dominion and legalizing the grant to the appellant? and, secondly, If so, had the British Columbia Legislature the power to enact it?

These two questions their Lordships answer in the affirmative.

First, as to the true construction of the Act. On that point it seems to their Lordships unquestionable that the Act would be altogether abortive and meaningless if the view taken of it by the Supreme Court of British Columbia were to prevail. That the word "settler" in the Act includes the appellant, as held by the trial judge, has not been questioned by the learned judges in the Full Court, and that the lot in dispute is in the railway belt therein mentioned is not controverted. The reasoning upon which the learned judges upheld the respondents' contentions is summed up by the Chief Justice for the Court in the following words: "There is nothing in the operative clauses of the Act (s. 3), which in terms purports to declare the title in the land to be in the Crown or attempts to deprive the company of any interest vested in it under its patent from the Dominion, and we must, of course, impute a rational and beneficial intention to the Legislature rather than an irrational and injurious intention."

Their Lordships cannot concur in that opinion. It seems clear to them that the true construction of that clause is that it imposes upon the Crown the obligation, and does not merely confer the power, of issuing a grant to certain of the settlers therein mentioned, of whom the appellant is one. It reads as follows: "Upon application being made to the Lieutenant-Governor in council, within twelve months from the coming into force of this Act, shewing that any settler occupied or improved land within said railway belt prior to the enactment of chapter 14 of 47 Victoria (1883), with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

In their Lordships' opinion this enactment in a remedial Act,

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read with the other parts of it, means clearly that a grant in fee simple, without any reservations as to mines and minerals, of any of the land therein mentioned, including the lot in question, if applied for within twelve months, as was done by the appellant, should be issued to the settlers therein mentioned, including the appellant as to the particular lot in dispute, though previously such a grant could not legally have been issued, because the said land had already been granted with its mines and minerals to the Dominion Government by the Provincial Act of 1883, and subsequently by the Dominion Government to the respondents. If the Act of 1904 did not apply to this lot, amongst others, because the title to it was then vested in the respondents, it would have no possible application at all. Such a construction would defeat the clear intention of the Legislature.

On the constitutionality of the Act of 1904 and the power of the British Columbia Legislature to enact it their Lordships see no reason for doubt. The Legislature had the exclusive right to amend or repeal in whole or in part its own said statute of December, 1883 (47 Vict. c. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the province, and affects a work and undertaking purely local (s. 92, sub-s. 10, of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament the legislative power over the company has since been transferred to the federal authority, but that Act, of course, has no application to this case.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed; that the judgment of the Supreme Court of July 31, 1906, ought to be reversed with costs to be paid by the railway company, and the judgment of Martin J., dismissing the action with costs, restored.

The respondents will pay to the appellant the costs of this appeal.

Solicitors for appellant: *Gard, Rook & Co.*

Solicitors for respondents: *Hepburn, Son & Cutcliffe.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR VICTORIA . . PLAINTIFF;

AND

MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF MELBOURNE . . . . DEFENDANTS.

J. C.*
1907
July 22, 31.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Law of Victoria—Victorian Electric Light and Power Act, 1896, *ss.* 38, 39—*Electric Light and Power Act*, 1901, *s.* 3—*Construction—Powers of Undertakers to vary Rates of Charge.*

Under the Electric Light and Power Act, 1896, the respondents supply electricity within the city of Melbourne under two different systems of charge, one at a fixed rate, the other at a rate varying with the amount consumed. The system adopted is at the choice of the customer; within each system no preference is given to one customer over another:—

Held, that, by the true construction of ss. 38 and 39 of the said Act, they were authorized so to do, and were not restricted to one uniform rate for all electricity supplied by them. The preference prohibited by s. 39 is not as between customers dealing under two different systems, but only as between customers dealing under the same system.

Held, also, that s. 3 of the Electric Light and Power Act, 1901, in authorizing a specified variation in rates of charge after a judicial decision to the effect that they must in all cases be uniform, did not either expressly or impliedly declare that, except in the special instance, the judicial decision must be upheld.

APPEAL by special leave from an order of the High Court (March 31, 1906), reversing an order of the Supreme Court of Victoria (November 29, 1905) and dismissing the appellant's action with costs.

The respondents supply electricity in the city of Melbourne to some consumers at a flat rate of $4\frac{1}{2}d.$ per unit, and to other consumers at a maximum demand rate of $7d.$ per unit for such portion of the electricity supplied as is equal to a consumption for a period of forty-five hours per calendar month at the highest rate of consumption during the month, and at the rate of $2d.$ per unit for the remainder of the electricity supplied during the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

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month. In the result some consumers in the city pay to the respondents $4\frac{1}{2}d.$ per unit for all the electricity supplied to them, while other consumers in the city are supplied by the respondents with electricity at prices varying from $2{\cdot}59d.$ to $4{\cdot}05d.$

The appellant's action, brought on the relation of the Metropolitan Gas Company, was for an injunction to restrain the respondents from continuing to charge consumers for supplies of electricity at rates which are not uniform throughout its area of supply. The respondents denied that they had acted in contravention of the Electric Light and Power Act, 1896, from which statute they derive their powers.

The Supreme Court granted the injunction with an exception as authorized by Act 1901, No. 1775, s. 3, unless the charge should be uniform throughout the respondents' area of supply. They held the decision in *Attorney-General* v. *Mayor, &c., of Melbourne* (1) to be binding upon them.

The High Court reversed this order.

Danckwerts, K.C., and *E. Morten*, for the appellant, contended that the course pursued by the respondents was prohibited by s. 39 of the Act of 1896. In making agreements for the supply of electricity to some consumers at a flat rate, while other consumers were charged a maximum demand rate, they shewed a preference to some consumers over others contrary to the terms of that section. The charges made were not uniform, as expressly directed by the Act. The effect of s. 3 of the Electric Light and Power Act, 1901, No. 1775, was to authorize a variation in charge to a limited extent, that is, the respondents might make a lower uniform charge for electricity supplied for power or heating purposes than for that supplied for lighting. Even that lower charge must be uniform, and the effect of that section was, except as thereby specially provided, to uphold the decision in 27 Vict. L. R. 568. That section in effect amounted to a statutory declaration that, under the Act of 1896, only one uniform rate could be charged within the area of supply except as expressly directed and authorized by that section. On this point, namely, as to the implied consequence of the section, *Attorney-General*

(1) (1901) 27 Vict. L. R. 568.

v. *Clarkson* (1) was referred to, in which the Legislature was held to have adopted the construction put upon an enactment (Finance Act of 1894, s. 5, sub-s. 1) in *Attorney-General* v. *Fairley*. (2)

Sir R. Finlay, K.C., and *Nicoll, K.C.*, for the respondents, contended that by the two systems of charging, namely the flat rate and the maximum demand rate, the respondents did not contravene the provisions of the Act of 1896. Sect. 39 of that Act does not enact that the price to be charged should be a single identical price per unit of all electricity supplied. Sects. 38 and 39, read together, are intended to secure equality of charges as between the persons supplied, and to prevent preference between them. The price for every unit is in fact uniform within the meaning of the Act if the price is the same to all persons alike for the supply of electricity under the same conditions. Different rates may be charged to different persons under different circumstances, provided that the conditions of supply are in all cases the same. Sect. 3 of the Act of 1901 provides for a special case and has no bearing on the facts of this case. The case in 27 Vict. L. R. 568 did not apply, and was, moreover, wrongly decided so far as it prescribed a uniform rate of charge in all cases irrespective of the purpose to which electricity was applied by the purchaser. Sect. 3 gave power to the company to depart from a uniform rate in a particular instance, but it did not declare that except in that instance the former Act had prohibited, on its true construction, any variation in the charge whatever the variation in the circumstances of supply.

Danckwerts, K.C., replied.

1907
July 31

The judgment of their Lordships was delivered by

LORD ATKINSON. The proceeding out of which the appeal in this case arose was an information exhibited by the Attorney-General of the State of Victoria on the relation of the Metropolitan Gas Company against the corporation of the city of Melbourne, who are by an order of the Governor in Council, dated September 6, 1897, made under the authority of an Act

(1) [1900] 1 Q. B. 156. (2) [1897] 1 Q. B. 698.

J. C. 1907 — ATTORNEY-GENERAL FOR VICTORIA v. MELBOURNE CORPORATION. —

of the Victorian Legislature, entitled "The Electric Light and Power Act, 1896" (59 Vict., No. 1413), constituted undertakers for the supply of electricity within that city, to restrain them from continuing to charge their consumers for electricity supplied, rates which are not uniform per unit throughout the city.

There is no dispute as to the facts. It is admitted that the corporation supply electricity under two different systems at rates appropriate to each, but not identical. Under the first, the quantity used is charged for at the rate of $4\frac{1}{2}d.$ per unit. It is known as the "flat rate." Under the second, a rate of $7d.$ per unit, known as the "maximum demand rate," is charged for such portion of the electricity supplied as is equal to a consumption for a period of forty-five hours per calendar month at the highest rate of consumption during that month, and a rate of $2d.$ per unit is charged for the remainder of the electricity supplied during the month.

Both rates are less than the maximum rate authorized by the Act and order. It is admitted that it is optional with every customer, or intending customer, to choose the system under which he shall be supplied, and that, as between the several customers under each system, no preference is given to one customer over the other, though under the operation of the second system different results work out in the case of different customers, as must be the case where, as in this instance, the amount consumed is taken into consideration in fixing the price.

The counsel for the plaintiff contend that the mode of carrying on their business adopted by the defendants is illegal; that they cannot have two different systems of supply, and are only entitled to charge one uniform rate for all electricity supplied by them, irrespective of the quantity supplied, or the time when, or circumstances under which, it is supplied.

The question for decision turns on the construction of s. 39 of the above-mentioned statute taken in connection, as it must be, with s. 38, which immediately precedes it. The two sections are in the terms following:—

"Section 38.—(1.) Where a supply of electricity is provided in any part of an area for private purposes then, except in so

far as is otherwise provided by the terms of the order authorizing such supply, every council company or person within that part of the area shall on application be entitled to a supply on the same terms on which any other council company or person in such part of the area is entitled under similar circumstances to a corresponding supply."

"Section 39.—The undertakers shall not in making any agreements for a supply of electricity shew any preference to any council company or person and the charge for such supply shall be uniform throughout such area so that each council company or person shall be supplied at the same price and not less than any other council company or person, but such price shall not exceed the limits of price imposed by or in pursuance of the order authorizing them to supply electricity."

The case came on for trial on September 26, 1905, before the Chief Justice of Victoria, Sir John Madden. He referred the whole action on the pleadings and evidence to the Full Court of the Supreme Court of Victoria, who, considering that the case came within the principle of their previous decision in an action between the same parties, reported in 27 Vict. L. R. 568, decided in favour of the plaintiff, and in effect granted the injunction prayed for, restraining the defendants from supplying throughout the area of supply electricity at other than a uniform rate, except so far as is authorized by the Electric Light and Power Act, 1901 (1 Edw. 7, No. 1775).

By this previous decision the defendants had been restrained from supplying electricity for heating or power purposes at a rate lower than the rate charged for lighting purposes. And in consequence of it the Legislature of Victoria had passed the Act in the order of the High Court mentioned, the 3rd section of which runs as follows: "3. Notwithstanding anything in any other Act contained, it shall be lawful for any undertaker within the meaning of the Electric Light and Power Act, 1896, or for any gas company to charge for the supply of electricity or gas used for power or heating purposes respectively or both a lower uniform charge than that charged for the supply of electricity or gas used for lighting purposes."

On appeal to the High Court of Australia the decision in the

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present case was reversed, and an order made dismissing the plaintiff's action with costs. From this last-mentioned decision the present appeal has, by special leave, been brought.

It was in argument contended on behalf of the plaintiff, on the authority of *Attorney-General* v. *Clarkson* (1), that the above-mentioned statute of 1901 amounted to a statutory declaration that according to the true meaning of the Act of 1896 only one uniform rate could be charged by the defendants for the electricity supplied by them throughout their district.

In *Attorney-General* v. *Clarkson* (1) the Crown claimed payment of the further duty called "settlement estate duty" on a legacy bequeathed by a testator on a certain contingency which, at the date of his death, had not happened and might never happen. One of the questions for decision was whether this legacy could be held to be "settled property" within the meaning of s. 5, sub-s. 1, of the Finance Act of 1894.

In a previous case of *Attorney-General* v. *Fairley* (2) it had been decided that property bequeathed by will on a contingency which had not arisen at the testator's death, and might never arise, was under the provisions of the above-mentioned section liable to this higher duty.

By s. 14 of the Finance Act of 1898 (61 & 62 Vict. c. 10) it was provided that, "Where in the case of a death occurring after the commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shewn that the contingency has not arisen and cannot arise, the said duty paid in respect of such property shall be repaid." It is quite obvious that this enactment must have contemplated that the duty should continue to be paid on such a contingency, since it provided that, when so paid, it should, in certain cases, be returned, and was therefore an adoption of the construction put upon s. 5, sub-s. 1, of the Finance Act in *Attorney-General* v. *Fairley* (2); but the Act of 1901 merely empowers the company to do that which they had insisted they had under the Act of 1896 the right to do, and by no means affirms expressly or impliedly that the Court which held, on the construction of the latter statute, that they had no right to do

(1) [1900] 1 Q. B. 156. (2) [1897] 1 Q. B. 698.

this thing, were justified in so deciding. Cases constantly occur where, if a Court, even of first instance, should put upon a statute a construction which would defeat its obvious purpose, or cause great inconvenience, the speediest and most effective remedy is to pass an Act in a form similar to that of 1901, setting the matter right. Circumstances may not permit the delay necessarily involved in bringing the embarrassing decision before higher tribunals for reconsideration. The fact, however, that this remedy was at once applied by the Legislature of Victoria does not, in the absence of express words or clear intendment, preclude those superior tribunals from reviewing the decision of the inferior when the occasion arises.

In the opinion of their Lordships the contention of the plaintiff on this point is entirely unsustainable.

Sect. 13 (*a*) provides that conditions and restrictions may be inserted in, or prescribed by, the Order in Council made under the Act with regard, amongst other things, to "the limitation of the prices to be charged in respect of the supply of electricity."

Sect. 38 is practically identical with the 19th section of the English Act, the Electric Lighting Act, 1882; but s. 39, dealing with preference, differs in its wording from s. 20 of the English Act of 1882, relating to the same subject.

In *Metropolitan Electric Supply Co., Ld.* v. *Ginder* (1) it was held by Buckley L.J. that the words "a supply on the same terms," used in s. 19 of the English Act, bear their natural meaning and include price. Mr. Danckwerts contended, on behalf of the plaintiff, however, that the same words, contained in the corresponding section of the Victoria Act, namely, s. 38, cannot, by reason of the provisions of s. 39, which follows it, be held to include price. Their Lordships cannot concur in this view.

Sect. 39 is rather unskilfully drawn and clumsily worded, but their Lordships think that the "preference" prohibited in substance by it is "a preference" between customers dealing under similar circumstances, and not between customers dealing under two different systems of supply, either of which they are free to select, and therefore dealing under entirely different circumstances.

(1) [1901] 2 Ch. 799, at p. 811.

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This construction reconciles the two sections (38 and 39) one to the other, and makes them consistent; does no violence to any of the provisions of either; does not impose on the defendants, as would the construction contended for by the plaintiff, most embarrassing restrictions in the conduct of their undertaking; and at the same time promotes rather than hurts the interests of the consumers, while there is, in the view of their Lordships, nothing in s. 52 of the Act which prevents its being adopted.

Their Lordships are therefore of opinion that the decision of the High Court of Australia was right and should be affirmed, and this appeal dismissed, and they will humbly advise His Majesty to that effect.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *James White & Leonard.*
Solicitors for respondents: *Wadeson & Malleson.*

[PRIVY COUNCIL.]

J. C.* 1907 *May* 8, 9; *July* 31.

LYTTELTON TIMES COMPANY, LIMITED . DEFENDANTS;

AND

WARNERS, LIMITED . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND (IN APPEAL).

Law of Contract—Lessor and Lessee—Implied Obligations as to quiet Enjoyment—Common Intention—Printing Machinery and Hotel Bedrooms—Nuisance from Noise and Vibration.

Implied obligations in a contract must be governed by the common intention of the parties.

In an action by the respondents as lessees against the appellants for an injunction and damages, it appeared that both parties had agreed to a rebuilding of the appellants' printing-house on terms that the respondents were to rent from the appellants the upper floors as additional bedrooms for their adjoining hotel, and the appellants were to

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* *Present:* THE LORD CHANCELLOR, LORD ROBERTSON, LORD COLLINS, SIR FORD NORTH, and SIR ARTHUR WILSON.

have on the ground floor an engine-house and printing machinery for the prosecution of their business, both parties believing that the noise and vibration which were the cause of action would be so slight that it might be disregarded:—

Held, that in the absence of evidence that the appellants had erected the building or worked the machinery and plant improperly the action must be dismissed. Both parties contemplated that the appellants should keep on printing, and that the respondents should have reasonably quiet bedrooms, but the latter intention could not be enforced if it would frustrate the former.

APPEAL from a judgment of the Court of Appeal of New Zealand (Edwards and Chapman JJ. dissenting), which granted an injunction restraining the appellant company from working their printing plant and machinery between the hours of 9 P.M. and 8 A.M. so as to cause any noise or vibration whereby the respondent company should be interfered with in the enjoyment of its freehold and leasehold premises, and directing an inquiry as to damages.

The respondents sued, under the circumstances stated in the judgment of their Lordships, for an injunction restraining the appellants from using or working their plant and machinery so as to cause a nuisance to them. They alleged that they were seriously disturbed in the enjoyment of the premises leased to them and of their freehold property. The defence was a denial of the nuisance, and also that the agreement for the lease under which the respondents held possession was entered into with knowledge on the part of the respondent company that the working of the plant and machinery caused noise and vibration, and on the understanding that the plant and machinery were to continue to remain on the land and be worked by the appellant company in its then position, and that the plans prepared by the architect who had acted for the respondent company shewing the position of the machinery in the proposed new building were approved by the respondent company, and that, as to so much of the respondent company's claim as referred to their freehold premises, the alleged noise and vibration were heard and felt owing to the openings made at the request of the respondent company in the walls of the building erected on the land of the respondent company and of the appellant company as

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provided by the said plans and approved by the respondent company.

The trial judge recorded his findings of fact, which were acquiesced in by both parties and are set forth in their Lordships' judgment, and it was agreed that the case should be at once removed to the Court of Appeal. The Court of Appeal by a majority decided in favour of the respondents.

The Chief Justice found that the plans were submitted to the respondents only so far as they disclosed the accommodation that the respondent company was to have, and that they did not shew the provision made for deadening the noise. He thought that the appellants could not contend that the respondent company had consented to the noise and vibration upon the finding of Denniston J. that each party signed the agreement in the belief that the noise and vibration, if not absolutely unfelt, would be so slight as not to be an inconvenience, and that the appellants had not shewn that the building could not have been so constructed as to render the noise and vibration so small as not to inconvenience the respondent company. He found that the evidence shewed that the building might have been constructed differently, so as to greatly minimize the transmission of noise and vibration. The conduct of the respondents in and about the agreement did not estop them from contending that they were entitled to be relieved from a nuisance which interfered with their enjoyment of their rooms, and that a landlord could not derogate from his own grant.

T. R. Hughes, K.C., and *J. M. Paterson*, for the appellants, contended that this judgment should be reversed. The respondents entered into their agreement with the full knowledge that there was a risk of noise and vibration from the appellants' machinery, and contracted on the understanding that the appellants were entitled to continue its user. The evidence shewed that the noise and vibration had not been increased, but had rather been diminished. The respondents had approved the plans of building. No representation or warranty had been given by the appellants. If any assurances had been given by the architect, he was not the agent of the appellants, and the respondents

consulted him at their own risk. As for the obligations of the appellants as lessors, the nature of the property demised had to be considered—premises over a printing establishment. Noise and vibration, if any, must be regarded as an inseparable incident of the tenure, and not in derogation from the grant. They referred to *Myers* v. *Catterson* (1); *Birmingham, &c., Banking Co.* v. *Ross.* (2)

Levett, K.C., and *Dighton Pollock*, for the respondents, contended that the appellants knew at the time of the agreement that the rooms in the leasehold premises were to be used as bedrooms, and that there was therefore an implied obligation upon them as lessors not to interfere with their convenient and reasonable use and enjoyment as bedrooms. The respondents were not shewn to have any knowledge that the appellants' machinery would necessarily be so used as to cause such noise and vibration as would interfere with their rights as lessees. They never consented to such user, and are not precluded from obtaining relief in respect of it. The findings of the trial judge are to the effect that they entered into the agreement in the belief that there would be no material noise and vibration, and otherwise would not have entered into it. The onus was on the appellants to shew that the respondents expressly agreed or understood to the contrary. The evidence also shewed that there were methods available to the appellants to abate or minimize the noise and vibration complained of, and that they neglected to adopt them. The freehold premises were distinguishable in this matter from the leasehold, and even if the respondents were precluded from obtaining relief in respect of the latter the same consideration did not apply to the former. They referred to *Caledonian Ry. Co.* v. *Sprot* (3); *Myers* v. *Catterson* (1); *Birmingham, &c., Banking Co.* v. *Ross* (2); *Broomfield* v. *Williams* (4); *Aldin* v. *Latimer, Clark & Co.* (5); *Pollard* v. *Gare* (6); *Rigby* v. *Bennett.* (7)

Hughes, K.C., replied.

(1) (1889) 43 Ch. D. 470.
(2) (1888) 38 Ch. D. 295.
(3) (1856) 2 Macq. H. L. 449.
(4) [1897] 1 Ch. 602, 630.
(5) [1894] 2 Ch. 437, 444, 447.
(6) [1901] 1 Ch. 834.
(7) (1882) 21 Ch. D. 559. 567, 569.

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LYTTELTON TIMES COMPANY, LIMITED v. WARNERS, LIMITED.
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The judgment of their Lordships was delivered by

LORD LOREBURN L.C. In this case there has been a marked difference of opinion among the learned judges in the Supreme Court of New Zealand, arising out of a state of facts which may be summarized as follows:—

In 1902 Warners, Limited, owned a hotel in Christchurch adjoining premises in which the Lyttelton Times Company, Limited, carried on business as printers and newspaper publishers. It occurred to Mr. Luttrell, an architect, that the hotel could be provided with additional bedrooms (which were needed), and that the printing house could be accommodated with better premises (which was desired), if the printing house were rebuilt so that its business could be carried on in the lower floor, and part of the upper floors should consist of bedrooms, and be let as such to the hotel. Negotiations ensued, in which Luttrell, though an intermediary, was the agent of neither side, and in the end an agreement was reached under which the building was to be erected, and Warners, Limited, were to rent a portion of the upper floors for ten years at a rent of 300*l.* a year. What occurred in the negotiations preceding this agreement has been stated by Denniston J., whose findings in fact are accepted on all hands.

"Each party entertained, very naturally, doubts as to the wisdom of combining in the same building an engine-house and printing machinery with hotel bedrooms. Each party spoke of the risk of noise and vibration. In each case such doubts were so far removed by the representation of Mr. Luttrell as to his ability to neutralize such risk that I am satisfied each party signed the agreement in the belief that the noise and vibration, if not absolutely unfelt in the bedrooms, would be so slight as not to be an inconvenience. Only on such a supposition can I conceive two bodies of intelligent and experienced men of business entering into the agreement they did—an agreement containing no stipulation or provision, no guarantee and no indemnity in respect of a risk which was apparent, and admittedly had been considered."

The building proceeded, and Luttrell's anticipations have not been realized. There is noise and vibration which causes

substantial inconvenience in the new bedrooms and in some of the old bedrooms close to the openings made in the old wall of the hotel to communicate with the new building. Thereupon Warners, Limited, brought this action for an injunction and damages.

At the root of the difficulties in the case as presented to their Lordships in argument lies this question: Ought the fact that one of the parties was the grantor and the other the grantee of a lease to dominate the decision of the case? The maxim that a grantor cannot derogate from his grant expresses the duty ordinarily laid on a man who sells or leases land. But it does not touch a similar and equally binding duty that may in certain cases be laid on a man who buys or hires land. If A. lets a plot to B., he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired. So also if B. takes a plot from A., he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot remaining in A.'s hands was destined. The fact that one lets and the other hires does not create any presumption in favour of either in construing an expressed contract. Nor ought it to create a presumption in construing the implied obligations arising out of a contract. When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention.

In this case their Lordships think that both parties agreed upon a building scheme with the intention that the building should be used for bedrooms and also for a printing house according to a design agreed upon. Both parties believed these two uses could co-exist without clashing, and that was why both of them accepted the scheme. Neither would have embarked upon it if he had not thought his intended enjoyment of the building would be permitted, and both intended that the other should enjoy the building in the way contemplated. They were mistaken in their anticipation. But if it be true that neither has done or asks to do anything which was not contemplated by both, neither can have any right against the other.

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Mr. Levett and Mr. Pollock argued the case on behalf of the respondents (plaintiffs) as though the common intention was that the plaintiffs should have reasonably quiet bedrooms. It was so, but that was only one half of the common intention. The other half was that the defendants should keep on printing. One cannot bisect the intention and enforce one half of it when the effect of so doing would be to frustrate the other half. Accordingly their Lordships agree with the conclusions of Edwards and Chapman JJ.

If it could be shewn that the defendant company or its servants had erected the building or established or worked their machinery and plant improperly, no doubt there would have been a cause of action. But that is not found by Denniston J., nor by the majority of the Court of Appeal, nor was it in reality the case made by the plaintiffs. It is rather put on the ground that a duty lay on the defendant company to prove affirmatively that the building could not have been so constructed as to avert a nuisance, and that they had failed in that duty. Their Lordships do not think that in this case the burden of proof is on the defendants, and share what appears to have been the opinion of most of the judges in New Zealand, that negligent or improper construction and working have not been established.

Under these circumstances their Lordships will humbly advise His Majesty that this appeal ought to be allowed, that the judgments of the Court of Appeal and the Supreme Court ought to be discharged, and that the action ought to be dismissed with costs in the Courts of New Zealand on such scale as may be directed by the Court of Appeal in New Zealand.

The respondents will pay the costs of this appeal.

Solicitors for appellants: *Hawes, Wood & Ware.*
Solicitors for respondents: *A. R. & H. Steele.*

[PRIVY COUNCIL.]

MACNAGHTEN . . . . . PLAINTIFF;

AND

PATERSON . . . . . DEFENDANT.

J. C.*
1907
June 19, 20;
July 22.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Covenant to pay Annuity for Separate Use of Wife without Power of Anticipation—Right to annul the Covenant on Notice to Trustee—Wife's Waiver of Notice Valid.

A deed of separation was executed in 1894 by the respondent and his wife, the former covenanting to pay to a trustee thereunder an annuity for the separate use of the latter without power of anticipation. Power was reserved to the respondent to give notice to the trustee after the expiration of twelve months from the date of the deed of his intention to pay a reduced amount, in which case, unless all the parties agreed as to the amount to be thereafter paid, the covenants in the deed should be void and of no further effect. Before the expiration of twelve months notice of such intention was given to the wife's solicitors, and the wife instructed them to waive the stipulated notice to the trustee.

In an action brought in 1904 to recover all arrears of annuity due under the deed as a still subsisting arrangement, the Supreme Court of the colony decreed the amount, holding that the wife's waiver of notice to the trustee was in contravention of the restraint clause in the deed:—

Held, that the High Court rightly reversed this decree. On the true construction of the deed the restraint clause applied to the annuity so long as it was payable, but not to the notice. Personal service thereof on the trustee was a mere formality which the wife was entitled to waive. Otherwise it was inequitable that she should enforce an obligation from which she had induced her husband to omit to free himself in the manner stipulated.

APPEAL by special leave in forma pauperis from an order of the High Court of Australia (June 30, 1905) overruling an order of the Supreme Court of New South Wales (March 8, 1905). The case is reported in 2 Com. L. R. 615 and 5 N. S. W. State Rep. 90.

The action was by the appellant, authorized thereto by orders of the Supreme Court made in its equitable jurisdiction under ss. 38 and 44 of the Trustee Act, No. 4 of 1898, to recover 1879*l.*

* *Present:* THE LORD CHANCELLOR, LORD ASHBOURNE, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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the balance of moneys alleged to be due by the respondent to Gill, the trustee of a deed of separation between the respondent and his wife, under a covenant contained therein, which is sufficiently set out in the judgment of their Lordships.

The pleas of the respondent were (1.) a denial of the debt; (2.) a plea on equitable grounds setting out clause 4 of the separation deed, and insisting that Gill was only a trustee in the separation deed for Mrs. Paterson, who was solely entitled to the moneys payable under the covenant, that Mrs. Paterson had waived the giving of notice to Gill and exonerated the respondent from giving such notice, that the liability under the deed was considered as at an end, and the respondent's covenant therein had become void and no longer binding, and the respondent had paid other moneys to Mrs. Paterson and entered into other arrangements with her from time to time on the faith and understanding that the arrangement in the deed was at an end, and the covenants void, and that Mrs. Paterson had accepted those moneys and entered into the other arrangements on the same faith and understanding, and she and the plaintiff were estopped by her conduct from setting up and suing on the said deed.

The jury found as stated in their Lordships' judgment, and thereupon a verdict was entered for the plaintiff for 100*l.*, with liberty to move to increase it to the amount claimed. On motion being made the Supreme Court increased the verdict to the amount claimed.

The appellant's contention was that, as by the separation deed Mrs. Paterson was restrained from anticipating the payments of the annuity thereby covenanted to be paid, she was thereby precluded from releasing the respondent from the necessity of giving notice to Gill in order to put an end to the said deed, and, secondly, that the appellant was not bound by the acts of Mrs. Paterson.

With regard to Mrs. Paterson's waiver of notice to the trustee, Owen J. said: "I am clearly of opinion that she had no such power at all, because, although the money had to be paid to her trustee for her separate use, she had no power to anticipate the same. In my opinion this waiver of notice by Mrs. Paterson would be clearly an anticipation in contravention of the restraint

clause in the deed. The law on the interpretation of a clause of this kind is laid down in *Bateman* v. *Faber*. (1) Lindley M.R. says: 'A married woman cannot by hook or by crook, by any device, even by her own fraud (the case goes that length), deprive herself of the protection which the restraint on anticipation throws around her.' This clause against anticipation was introduced to protect married women from the persuasions of 'their husbands, because a married woman might be under the influence of her husband.' Here by clause 3 Mrs. Paterson was restrained from anticipating the fund payable under the deed, and it appears to me that clause 4 requires notice to be given to the trustee before any alteration of the deed was made. That was part and parcel of the protection thrown round this married woman to prevent her husband from persuading her to set aside or vary this deed. Then it was said that, even supposing notice had been duly given to the trustee, the defendant could then have said: 'I do not intend to come to an agreement, and therefore the deed is at an end.' It was contended that the defendant had this power because he need not agree after discussion, and no arrangement being come to within one month after he gave the notice, he could then set the deed aside. But no one can say that that would have been the effect of giving the trustee notice. If the trustee had received notice he might have been able to persuade the parties to come to some agreement. Mrs. Paterson no doubt wanted to have the allowance increased, and the defendant wished to have it decreased, and it is quite possible that the trustee could have shewn Mrs. Paterson that under the circumstances the husband could not be expected to increase the amount, or, on the other hand, he might have been able to shew the husband that the amount should be increased. But whatever might have been the effect of giving notice to the trustee, it is what the settlor himself under the deed provided, that is that the trustee should have notice, and that the deed was not to be set aside or varied unless notice was given to the trustee, but the defendant did not give the trustee the necessary notice.

"Then there is the further question as to how far he waiver of

(1) [1898] 1 Ch. 144, at p. 149.

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notice by Mrs. Paterson could bind the trustee, who received no notice in any shape or form. I fail to see how any waiver made by Mrs. Paterson could have the effect of precluding the trustee from availing himself of the terms of the deed as he has done in this case."

The High Court reversed this decision. The judges considered that the restraint on anticipation would probably not have prevented Mrs. Paterson from releasing the respondent from the necessity of giving notice to Gill in order to bring the said separation deed to an end. But they did not consider it necessary to finally decide that point, because Mrs. Paterson had after the dates at which instalments would have become due under the said separation deed accepted other provisions in lieu of each of those payments. This she was entitled to do according to the decision of the House of Lords: *Hood Barrs* v. *Heriot* (1), and the appellant was bound by her acts.

Vaughan Hawkins, for the appellant, contended that the order of the Supreme Court ought to be restored. The respondent's covenant to pay an annuity to his wife contained in the deed of separation was without power of anticipation, and had not become void or been determined under clause 4 or otherwise. It is still binding on the respondent. The High Court has intimated to the contrary on the ground that restraint on anticipation has no application to the case of an executory contract of a married woman not relating to existing property. The Chief Justice said that "it is as much an incident of a contract between persons sui juris that it may be rescinded or released as it is an incident of property that it may be alienated, and under the Married Women's Property Act married women are persons sui juris for all purposes except as to separate estate subject to restraint on anticipation." He contended that this was erroneous in law, and that restraint on anticipation applied to all moneys payable in future under the covenant. The deed provided that revocation should only take place on one condition, namely, of giving notice to the trustee. The wife was restrained from anticipating or alienating the fund, and she was consequently

(1) [1896] A. C. 174.

restrained from waiving any of the future payments except by strictly complying with the condition on which alone the deed could be cancelled. Thus she was restrained from waiving notice to the trustee, and from throwing away his protection which the deed had thrown round her. The deed conferred rights and duties on the trustee in respect of the wife, and they could not be put an end to or waived by the wife without the trustee's knowledge or concurrence. Clause 4 did not give the husband power at will to cancel the deed, but provided a mode of readjustment of its terms by consent of all parties including the trustee, the husband's power in case of no consent being only in terrorem. As regards the equitable defence and estoppel arising out of the subsequent payments by the husband and acceptance thereof by the wife there was no plea to that effect, and the point was not raised until a late stage before the High Court. Most of these payments were under orders of Court for maintenance, and must be treated as payments on account. The wife being under disability could not bind herself to accept them in discharge of what was accruing to her in the future. Neither could she be said to have misled her husband either in intention or effect: if she had misled him it was no answer to this suit: see *Bateman* v. *Faber*. (1) Reference was also made to *Nicol* v. *Nicol* (2) and *Wing* v. *Harvey*. (3)

Levett, *K.C.*, and *Alfred Adams*, for the respondent, contended that the High Court was right. The appellant represented a mere trustee for Mrs. Paterson, and the liability of the respondent under his covenant came to an end before any of the moneys now claimed by the trustee became due or payable. The present appellant did not come into the transaction at all until after the deed had come to an end, and Mrs. Paterson had done the acts which afforded a defence to his claim. It was the respondent who had power to put an end to the deed and did so. Neither the wife nor the trustee, nor the two combined, had any power to prevent the respondent from putting an end to it. The waiver of notice was therefore of no practical consequence, and the notice to the solicitors was a practical compliance with the

(1) [1898] 1 Ch. 144. (2) (1886) 31 Ch. D. 524.
(3) (1854) 5 D. M. & G. 265.

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conditions laid down in clause 4. Mrs. Paterson's acts did not amount to an anticipation, and were not within the terms or intention of the restraint. Restraint on anticipation does not apply after the moneys on which it is to operate have become due. When Mrs. Paterson accepted the payments substituted by the respondent for those alleged to be due under the covenant in full satisfaction, she was no longer under the operation of the restraint clause, and her acceptance thereof bound both herself and her trustee. The payments were made and accepted under a common belief that the deed was at an end, and the wife must have known that the husband could not be paying on account, but was paying under a substituted arrangement. An executory contract which does not amount to a complete gift of existing property cannot be made irrevocable by using the words "without power of anticipation" with regard to contractual rights; and there is no ground for holding that it was within the contemplation of the parties that it should. Reference was made to *Tullett* v. *Armstrong* (1), *Hood Barrs* v. *Heriot* (2), *Bateman* v. *Faber* (3), and *Wing* v. *Harvey* (4); and Lord Macnaghten referred to *Derbishire* v. *Home.* (5)

V. Hawkins replied.

1907 *July* 22.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This case is peculiar in its circumstances. At first sight it seems to present questions not by any means easy of solution, and to touch very nearly points of nicety and difficulty on which little or no authority is to be found in the books. But, after the very full and able argument on both sides, their Lordships have come to the conclusion that there is no ground for disturbing the judgment of the High Court.

The question depends on the meaning and effect of a deed of separation dated April 2, 1894, made between Hugh Paterson, of Sydney, dentist, of the first part, Mary Stewart Paterson, his wife, of the second part, and John Stewart Gill, of Thursday Island, in the colony of Queensland, of the third part. The

(1) (1838) 1 Beav. 1; 4 My. & Cr. 390.
(2) [1896] A. C. 174.
(3) [1898] 1 Ch. 144.
(4) 5 D. M. & G. 265.
(5) (1853) 3 D. M. & G. 80.

deed is in the form in which such deeds used to be framed. Gill, who was a brother of Mrs. Paterson, was named as trustee for the purpose of the arrangement. The most important clauses are clause 3 and clause 4, which are in the following terms:—

"(3.) The said Hugh Paterson shall during the joint lives of himself and the said Mary Stewart Paterson, subject to clause 4 (provided the said Mary Stewart Paterson shall remain chaste), pay to the said John Stewart Gill, his executors, administrators, and assigns, the sum of four hundred pounds (400*l.*) per annum, payable quarterly on the first days of the months of January, April, July, and October in each and every year, the first payment to be made on the first day of April instant upon trust for the said Mary Stewart Paterson for her separate use, and she shall not have power to anticipate the same.

"(4.) In the event of the said Hugh Paterson at any time after the expiration of twelve months from the date hereof considering that the amount in the third clause mentioned should by reason of the diminution of his income or otherwise be reduced, he shall give notice thereof to the said John Stewart Gill, and in the event of no agreement being arrived at between all the parties as to the amount to be thereafter paid by the said Hugh Paterson to the said John Stewart Gill within one month after notice of his intention to pay such reduced amount has been received by the said John Stewart Gill by [? from] the said Hugh Paterson, then the arrangement herein contained shall be considered as at an end, and the covenants and agreements herein contained shall become void and not thereafter binding on any of the parties."

It is not necessary to refer to the other clauses. They are for the most part in common form. There is the usual covenant on the part of the trustee to indemnify the husband against the debts of the wife and the usual covenant for further assurance. In one aspect of the case it is perhaps not immaterial that Mrs. Paterson bound herself to do all such things as might be reasonably required for the purpose of giving full effect to the provisions contained in the deed.

The meaning of the deed seems plain enough. The arrangement was to hold good for a year. At the end of that period the

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husband, if he pleased, was to be at liberty to reopen the question of the wife's allowance with a view to its reduction. If the parties could not agree within a month's time the arrangement was to be at an end, and both husband and wife were to be remitted to their original position. It was therefore within the contemplation of the husband and the wife, and indeed it was part of the arrangement, that the capacity of the wife to bargain with her husband and the attitude of antagonism which preceded the deed of separation might be revived and resumed at any time after the interval of a year at the instance of the husband.

As soon as the deed was executed the trustee, who seems to have taken no part whatever in the preliminary negotiations, and who was then residing, and has since continued to reside, outside the colony, authorized a Mr. Hamilton, who had acted as solicitor for the wife, to receive the stipulated allowance on her behalf.

On March 26, 1895, as the year was drawing to a close, the husband's solicitors wrote to Mr. Hamilton's firm to ascertain if they were prepared to accept service of a notice in terms of clause 4 of the deed. They stated that their client was not in a position to carry on the terms of the agreement, and asked Mr. Hamilton's firm to give the matter their early attention, adding that they would be "compelled otherwise to take the course indicated by the deed and give the notice in due form so as to bring the present state of affairs to an end." Mrs. Paterson saw her solicitor and instructed him to waive notice to the trustee. It was obviously the right thing to do if it was competent for her to do it. The husband was master of the situation. It was better to come to the point at once and so give effect to the provisions of the deed and the intention of the parties. Nothing could be gained by making trouble over a mere technicality. Negotiations followed with regard to the amount of the allowance. These negotiations came to nothing, and the month expired without any settlement being reached. Both parties after that seem to have treated the agreement as at an end. Then followed a period of several years in the course of which various applications were made to the Court on the one side and on the other, and various orders were pronounced. Mr. Paterson

continued to make payments to or for the benefit of his wife, sometimes voluntarily and sometimes under an order of the Court. But these payments fell considerably short of the allowance provided by the deed of separation.

In 1899 Gill, the trustee, brought an action against Mr. Paterson on his covenant for the balance of the moneys due or alleged to be due under clause 3 of the deed. As Gill was out of the jurisdiction, an order was made for security for costs, and so that action was stopped. Then it seems that in 1903 the present appellant, who is said to be a clerk in a solicitor's office, and a person without means, was appointed trustee in Gill's place, and an order was made by the Supreme Court in March, 1904, vesting in him the right to sue for and recover the sum of 1879*l.* 9*s.* 4*d.*, alleged to be due under the covenant in clause 3 of the separation deed.

On June 2, 1904, this action was brought in the Supreme Court of New South Wales. It was tried before Darley C.J., and a jury of four persons, in December, 1904. In answer to questions left to them by the judge, the jury found—

(1.) That Mrs. Paterson accepted notice given to Hamilton in lieu of and as a good notice under clause 4 of the deed;

(2.) That Mrs. Paterson exonerated and discharged Mr. Paterson from giving notice to Gill;

(3.) That Mrs. Paterson accepted the moneys paid and other arrangements made since April, 1895, on the faith and understanding that the arrangement in the deed was at an end, and the covenant therein contained void.

By the direction of the judge, the jury returned a verdict for the plaintiff for 100*l.*, as to which no question is now raised, and his Honour reserved leave for the plaintiff to move to increase the verdict to 1879*l.* 9*s.* 4*d.*

A rule nisi was accordingly obtained, which the Supreme Court made absolute, ordering the verdict to be entered for the full amount claimed. The High Court on appeal discharged the rule with costs.

The Supreme Court rested their judgment mainly on the ground that, in their view, Mrs. Paterson was not in a position to waive notice to the trustee. "I am clearly of opinion," said

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Owen J., who gave the leading judgment, "that she had no such power at all, because, although the money had to be paid to her trustee for her separate use, she had no power to anticipate the same. In my opinion," his Honour added, "this waiver of notice by Mrs. Paterson would be clearly an anticipation in contravention of the restraint clause in the deed." This view was pressed upon their Lordships by the learned counsel for the appellant, who argued that the Court had no power to dispense with a provision tending to the protection of a married woman restrained from anticipation. On the other hand, the learned counsel for the respondent maintained that the contract for payment of the annuity was "an executory contract," and they said that a married woman in such a case might disregard a restraint against anticipation, which could not in their view be effectually attached to an annual payment secured merely by a personal covenant. To neither of these views are their Lordships disposed to accede. On the one hand, if there be a personal covenant for the payment of an annuity to a married woman for her separate use, there seems to be no reason why a restraint on anticipation should not be attached to the separate use, and when so attached be as valid to all intents and purposes as it would be if the subject of the separate use were income of a settled fund. So far as their Lordships are aware, in all cases where a husband in a separation deed covenants to pay an annuity to his wife the practice is to make the annuity payable to the wife for her separate use without power of anticipation. The forms, both in Mr. Davidson's and in Messrs. Key and Elphinstone's precedents, are to that effect, and it is difficult to see what objection there can be to the practice. On the other hand, their Lordships are unable to accept the view of the Supreme Court. It appears to them that the restraint on anticipation in clause 3 has nothing to do with clause 4. It protects the annuity so long as it is payable under the deed. But if the meaning of the deed is that it was to be competent for the husband to take steps which might have the effect of reducing or putting an end to the annuity altogether, it is difficult to see how the restraint against anticipation can prevent those steps being taken, or prevent the wife from waiving strict and literal compliance with formalities

required by the terms of the deed. It seems to their Lordships that, as regards the construction and effect of clause 4, the restraint against anticipation may be put aside altogether.

The real questions seem to their Lordships to be these:—(1.) Was the provision as to notice being given to the trustee imperative or directory only? (2.) If it was imperative on the husband, was the wife in a position to waive it, or, at any rate, is it competent for her now to insist upon it after having induced her husband to forego his advantage and so alter his position to his prejudice? On each of these points their Lordships' view is adverse to the pretensions put forward by the appellant.

Notice to the trustee as provided by clause 4 seems to be the merest formality. Any negotiation would necessarily be between husband and wife and their respective advisers. The trustee could have no voice in the matter. He was not arbiter in case of difference. If husband and wife agreed on a reduction, it is absurd to suppose that the trustee could interpose and stop the arrangement by objecting or withdrawing his consent. The object of naming the trustee as the person to whom notice was to be given could only have been to relieve the husband from the necessity of direct communication with the wife.

Apart from the effect of the restraint on anticipation, or rather apart from the effect of the influence attributed to it, it was hardly contended that the wife was not competent to waive notice to the trustee. Assuming, however, that the course pointed out by clause 4 was imperative and not directory, and that the wife was not in a position to waive the notice, it seems to their Lordships under the circumstances contrary to equity that the wife, having misled her husband and having induced him to alter his position and to refrain from taking the steps pointed out by the deed, can now turn round and claim payment of money under an obligation from which, if he had not been put off his guard, he could have relieved himself without trouble or expense, or at the worst at the expense of sending a registered letter to the trustee.

On this head of equity, which is in substance the case made by the defendant's equitable plea, their Lordships are disposed to hold that the action would not have been maintainable even

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if the provision as to notice were imperative and the wife had not been at liberty to dispense with it.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed, with the consequences which follow in pauper cases.

Solicitor for appellant: *J. H. Galbraith.*

Solicitors for respondent: *Crawford Chester, & Slade.*

[PRIVY COUNCIL.]

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McCORMICK . . . . . PLAINTIFF;

AND

SIMPSON AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Law of Canada—Will—Alternative absolute Gifts—Construction.

A testator gave to his widow his real estate for life, and at her death to his eldest son John for life, and thereafter to "become the absolute property" of John's eldest son, alternatively "to become the property of my son James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue; James and his son who predeceased him survived the widow:—

Held, that the gift to John's eldest son being of an absolute interest, it must, in the absence of words importing a different intention, and having regard to the context, be deemed to have been the intention of the will that the alternative gift to James should also be absolute. The gift over to the appellant in case of the death of James without male issue was defeated if either James or his son lived to take absolutely.

APPEAL from a judgment of the above Court (October 25, 1906), affirming a judgment of the Superior Court of Montreal (March 1, 1906) dismissing the appellant's action.

The action was instituted against the executors of the late James Cooper, jun., and the corporation of the Polytechnic School, to have it declared that the plaintiff is the owner of lots

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433 and 445 in the St. Louis ward in the city of Montreal; to have the executors condemned to deliver to him possession of lot 433, and the Polytechnic School condemned to deliver possession of lot 445, which they had acquired from the executors. There were also conclusions for the payment of the fruits and revenues of these immovables. The executors and the Polytechnic School were given the option of paying respectively $150,000 for lot 445 and $25,000 for lot 433 if they did not give up possession.

The plaintiff's claim was based upon the construction of the will of the late James Cooper, sen., under which he contended that he had become the owner of the immovable property in question.

The respondents denied that the appellant ever acquired any interest in these immovables under the will, and contended that James Cooper, jun., became the absolute owner of the property upon the death of his mother, the testator's wife.

The judgment of the Courts below was to the effect that the premises in suit were by the will vested in James Cooper, jun., and that no substitution was created in favour of his eldest son, should any such exist, unless such son had existed and James Cooper, jun., had predeceased him prior to the death of the testator; that it was only in the event of neither James Cooper, jun., nor his son taking possession as proprietor that appellant was to be benefited under the will; that James Cooper, jun., had succeeded with an absolute title, and that the corporation derived from him a good and perfect title.

T. Brossean, K.C., for the appellant, contended that he was called to be the beneficiary of the testator's estate in case of John Cooper dying without leaving an eldest son, and of James Cooper, jun., dying at any time without leaving an eldest son. The facts were that John Cooper predeceased the testator without leaving an eldest son, and that James Cooper, jun., died without leaving an eldest son. The substitution created in favour of the appellant was a fiduciary substitution, which means that in the event which happened of James Cooper, jun., dying without male issue, the appellant succeeded in his place. The death contemplated was death at any time, whether before or after the testator,

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before or after James had taken: see Thevenot d'Essaule, Traité des Substitutions, arts. 441, 442. The context of the will did not render a different meaning necessary or proper. It was not intended that James's taking the estate should oust the appellant from his right of substitution. The rule of construction to the effect that death in this case means death at any time should not be departed from: see *O'Mahoney* v. *Burdett* (1); *Ingram* v. *Soutten* (2); Civil Code, arts. 957, 962; *In re Schnadhorst* (3); *In re Coley*. (4)

Macmaster, K.C., and *J. E. Martin, K.C.*, for the respondent Simpson, contended that under the will the property in suit vested absolutely in James Cooper, jun., on the death of his mother. John had predeceased his father without issue. The appellant had only a contingent right of succession. The contingency never happened. If either James Cooper, jun., or his son succeeded, he took absolutely, and the appellant's contingent right was completely cut off. They referred to *Page* v. *McLennan*. (5)

Lafleur, K.C., and *Honoré Gervais, K.C.*, for the respondent corporation, cited *Lewis* v. *Killey*. (6)

Brossean, K.C., replied.

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The judgment of their Lordships was delivered by

LORD COLLINS. The question on this appeal is as to the construction of the will of one James Cooper, who died at Montreal in 1866 possessed of real and personal property. The will was made at Montreal, and is dated August 20, 1863. The material parts are as follows:—

"I give devise and bequeath to my beloved wife Phœbe Mountford . . . . the use, usufruct and enjoyment during the term of her natural life, of all and singular my real and personal movable and immovable property, estate and effects, stock-in-trade, household furniture, moneys, stocks, funds, securities for moneys, debts and actions to whatever the same shall amount or wherever

(1) (1874) L. R. 7 H. L. 388.
(2) (1874) L. R. 7 H. L. 408.
(3) [1902] 2 Ch. 234.
(4) [1901] 1 Ch. 40.
(5) R. J. Q. (1895) 7 C. S. 368; (1896) 9 C. S. 193.
(6) (1888) 13 App. Cas. 783.

found, and to me belonging at the day of my death, without any exception or reserve. To have and to hold use, receive and enjoy the same and every part thereof unto and to the use of my said dear wife, during the term of her natural life as aforesaid, and at her death the same to go to and be and become the property of John Cooper, of the said city of Montreal, gentleman, my son, issue of my marriage with the said Phœbe Mountford, and also to be held by him en usufruit during the term of his natural life, subject to the payment, within ten years after the decease of his said mother, of the following bequests, without interest, and for which the real estate which may belong to me at my death shall be charged and encumbered in favour of the legatees following, to wit: To my daughter Mary Cooper, wife of Mr. William M'Cormick, of Montreal aforesaid, clerk, the sum of eight hundred dollars currency;—To my daughter Phœbe Cooper, wife of Mr. James Lewis, of the said city of Montreal, bricklayer, the like sum of eight hundred dollars, said currency, and to my son James Cooper, at present residing in the city of Toronto, clerk, the like sum of eight hundred dollars, said currency, said bequests not to be in any way, nor shall the same be seizable or liable to be attached, taken in execution or in any wise appropriated for the debts of the said Mary Cooper, Phœbe Cooper, James Cooper, or John Cooper, or of the husbands of my said daughters, the same being expressly meant and intended to be for their maintenance and alimentary support, nor shall the same be subject to the marital control of any husband of my said daughters—The said John Cooper to have no power to sell or mortgage any part of the said real estate, nor shall the same be subject or liable to seizure or attachment for any debts he may contract, and I desire that said hereby bequeathed premises at the death of the said John Cooper do go to and be and become the absolute property of his eldest son lawfully begotten, failing such son then the same to be and become the property of my son the said James Cooper or of his eldest son lawfully begotten, and in case of the death of the said James Cooper without such male issue as aforesaid, then to the eldest son of my said daughter, Mary Cooper, wife of said William M'Cormick, whose name is James Cooper M'Cormick, subject always to the payment

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of said legacies or such portion thereof as may remain unpaid."

The dispute arises in respect of the real property left by the testator, of which the appellant claims to be the donee under the will. The Court of first instance and the Court of Appeal have both disallowed his claim. Their Lordships are of opinion that their decision was right. It is quite clear that the estates given to the wife and to the testator's eldest son John Cooper are not absolute, but for life only, and are given in terms showing that the draftsman clearly understood the difference between usufruct and absolute property. Then comes the gift to the eldest son of John, which is to become "the absolute property" of such eldest son, and would have defeated all subsequent contingent gifts had such a son come into existence and lived to attain a vested interest. But John never having had a son and having predeceased the testator, it has to be seen what the will provides in such event. The words are "the same to be and become the property of my (the testator's) son the said James Cooper, or of his eldest son." There are here no words to indicate that the gift was intended to be other than absolute, and though the word "absolute" is not used, yet contrasting the terms employed with those of the previous—usufructuary—gifts, it cannot, in their Lordships' opinion, be doubted that they do in their context import that one of the two named, if either survives to take an interest in possession on the failure of the previous limitation, will become the absolute proprietor in his own right, and thus defeat the contingent gift over. In point of fact both James and his son were alive at the death of the widow, and therefore James became proprietor in his own right. It is true his son predeceased him, but this did not qualify or divest the estate which had become vested absolutely in his father. Then there comes the gift over under which the plaintiff claims, "and in case of the death of the said James Cooper without such male issue as aforesaid" then to the appellant. Read in its context, this clause must mean death in the lifetime of the testator or widow, for the previous gift to James or his son on the failure of the former limitation is absolute if either lives to take an interest in possession. In the language of Curran J., it was only in the

event of neither James Cooper, jun., nor his son taking possession as proprietor that plaintiff was to be benefited under the terms of the testator's will.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of all the respondents. Their Lordships consider two sets of costs should be allowed.

Solicitors for appellants: *Gribble & Co.*
Solicitors for respondents: *Lawrence, Jones & Co.*

[PRIVY COUNCIL.]

ESQUIMALT WATERWORKS COMPANY . . PLAINTIFFS;

AND

CORPORATION OF THE CITY OF VICTORIA . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Law of British Columbia—Unrecorded Waters—Water Clauses Consolidation Act, 1897, *ss.* 2, 4—*Esquimalt Waterworks Act*, 1885, *s.* 10, *and the Extension Act*, 1892, *s.* 10—*Construction.*

By the British Columbia Water Clauses Consolidation Act, 1897, s. 4, the right to the use of all unrecorded water in any river, lake or stream is declared, subject to a proviso in favour of existing legal rights, to be vested in the Crown in right of the province; unrecorded water, by the interpretation clause (s. 2), includes all water not held for the time being under special grant by public or private Act.

In an action by the respondents in effect claiming to appropriate for the purpose of the municipality certain waters described as flowing from two different sources, Goldstream River and Niagara Creek, as being unrecorded water, and liable to be recorded in their favour under the said Act, it appeared that the waters so claimed had under the Esquimalt Waterworks Act, 1885, and its Extension Act, 1892, vested in the appellants by force of s. 10 of the former Act, subject to the perpetual and onerous obligation imposed by s. 10 of the Extension Act of supplying water to the respondents if required after notice and in large

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quantity; that considerable outlay had been incurred by the appellants in storing and conveying the waters in suit with a view to meeting such obligation; and that without the waters in suit they would be unable to meet it:—

Held, (1.) that the appellants' Acts of 1885 and 1892 are private Acts, in the sense that they confer special rights and impose special obligations upon them for special purposes.

(2.) That the Act of 1897 did not apply to the appellants. It was a subsequent general statute, and could not be intended to interfere with rights granted by special legislation to an extent which prevented the fulfilment of the statutory obligations imposed thereby.

(3.) That under the true construction of s. 2 of the Act of 1897 the waters in suit, having been granted to the appellants by special legislation, were not unrecorded within its meaning; and that the plain intention of the proviso to s. 4 was to preserve any right of diversion or appropriation existing under any Act already passed.

APPEAL from a judgment of the Full Supreme Court (January 8, 1907), reversing a judgment of Duff J. (May 3, 1906), which upheld the exclusive title of the appellants to the waters in suit.

On August 24, 1905, the respondents entered on the appellants' lands in Goldstream district and posted thereon four notices of their intention to apply under the Water Clauses Consolidation Act, 1897, to the Commissioner under that Act for four records of 5000 inches each of the water of Goldstream River and its tributaries.

In consequence of the posting of such notices the appellants sued for a declaration that the respondents were not entitled to any such record, and that the said water was not such as could be recorded under the Water Clauses Consolidation Act, 1897, and amending Acts, and for an injunction to restrain the respondents from entering upon the appellants' lands and from making or proceeding with any application to the Commissioner for such record, and claiming that they (the appellants) were exclusively entitled to the said waters.

The respondents at the trial counter-claimed for a declaration that they were entitled to divert and to appropriate the waters in suit for the municipal purposes of the city of Victoria, and to apply for and obtain a record thereof, or to appropriate and divert the said waters under some or all of the authorities and privileges referred to in their defence.

The controversy between the parties related to their respective statutory rights under various Acts of the British Columbia Legislature, the applicable sections of which are sufficiently set forth in their Lordships' judgment.

Sir R. Finlay, K.C., Luxton, K.C., and *Rowlatt*, for the appellants, contended that the judgment of the trial judge was right, and ought to be restored. They contended that the waters in suit were absolutely vested in the appellants under their Acts of 1885 and 1892, the evidence shewing that they had fulfilled all the prescribed conditions necessary to their appropriation. Upon the true construction of the two Acts, the provisions of the former Act applied to the additional lands privileges and waters which the defendants were authorized to acquire by the later Act; and accordingly the appellants have a special property in and the exclusive right to use the water in question which was acquired under these Acts. They referred especially to s. 10 of the later Act, which was inserted in consequence of an agreement come to between the appellants, respondents, and other companies claiming riparian rights in the waters in suit. It imposed an onerous and perpetual obligation on the appellants at the option of the respondents, and obliged them in that view to incur heavy expenditure in storing and conveying the said waters. This obligation cannot be fulfilled if they are deprived of the waters in suit. The respondents claim title to them under the Water Clauses Consolidation Act of 1897 as waters which they were entitled to have recorded in their favour; also that at the date of the Water Privileges Act, 1892, the appellants had not then lawfully appropriated them, and had not since got them recorded in their favour. Those two Acts, it was contended, vested the said waters in the Crown, and the appellants could not use them until recorded. But the Water Privileges Act of 1892 is a general public statute passed on the same day as the appellants' private Act of 1892. It could not have been intended to take away rights by the one statute which had been granted on the same day by the other. On its true construction, read with the later Act of 1897, which repealed and to some extent re-enacted it with variations, it expressly

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reserves and maintains the appellants' rights: see ss. 2 and 3 of the Act of 1892, ss. 2, 4 and 5 of the Act of 1897. The rights of the appellants are created by their private Acts, and the waters so vested in them are not unrecorded waters within the meaning of the Acts relied on by the respondents, and are unaffected by their provisions.

C. A. Russell, K.C., W. T. Taylor, K.C., and *Schiller*, for the respondents, contended that under the true construction of the Water Privileges Act, 1892, s. 2, and under ss. 2, 40, 41 and 42 of the Water Clauses Consolidation Act, 1897, the waters in suit must be deemed to be unrecorded waters. They had never been duly and effectually appropriated by the appellants. Their right to appropriate was not disputed, but it was subject to the paramount right of the respondents to apply under the general Act of 1897 for a record of these waters in their favour. Sect. 9 of the appellants' Act of 1892, viz., 55 Vict. c. 51, provided that nothing therein should be construed as in any way limiting or derogating from any grant or privilege accorded to the respondents under their own Corporation of Victoria Waterworks Act, 1873 (36 Vict. c. 20). See also s. 1 of 55 Vict. c. 51. They were entitled under their own Acts of 1873 and 1892, subject to the limitations therein specified, to acquire all water which they might deem necessary for the purpose of providing the water supply which they were thereby empowered to provide. Accordingly they served the notices complained of within the area mentioned in their Acts. They were in proper form, as was undisputed, and therefore they were entitled to have the waters in suit recorded in their favour.

Luxton, K.C., replied.

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The judgment of their Lordships was delivered by

SIR ALFRED WILLS. This action was brought to restrain the respondents from entering upon certain lands of the appellants and from posting thereon notices under the Act of British Columbia intituled "The Water Clauses Consolidation Act, 1897," and the substantial question is whether the respondents can appropriate for the purposes of the municipality certain waters flowing from two different sources, Goldstream River and

Niagara Creek, which waters the appellants claim to be theirs under the Esquimalt Waterworks Act, 1885, and the Esquimalt Waterworks Extension Act, 1892.

At the trial before Duff J. judgment was given for the appellants.

This judgment was reversed upon appeal to the Full Court by Irving and Morrison JJ., Hunter C.J. dissenting. From that judgment the present appeal is brought.

By the Esquimalt Waterworks Act, 1885, the appellants were incorporated and empowered to construct waterworks and all appliances connected therewith in the town of Esquimalt and the adjacent peninsula lying to the east of Esquimalt Harbour. By s. 9 they were empowered to "divert and appropriate the waters of Thetis Lake and Deadman's River and its tributaries, ... and to contract with the owners and occupiers of" lands taken for the waterworks, "and those having an interest or right in the said waters for the purchase of the same respectively," with provisions of an ordinary character for compensation.

By s. 10 "the lands privileges and waters which shall be ascertained, set out, or appropriated by the company for the purposes thereof as aforesaid shall thereupon and for ever afterwards be vested in the company." It is then provided that it shall be "lawful for the company to construct, erect and maintain . . . . all such reservoirs" and works "requisite for the said undertaking and to convey the water thereto and therefrom, in, upon and through" any land "intermediate between the said reservoirs and waterworks and the springs, streams, rivers, bodies of waters or lakes from which the same are supplied and the town of Esquimalt and the said peninsula . . . . by one or more lines of pipes as may from time to time be found necessary." Powers are further given to execute any works and occupy any land that may be necessary for distributing water to the inhabitants of the town of Esquimalt and the peninsula.

By s. 12 "the company shall regulate the distribution and use of the water on all places and for all purposes," and shall fix the price for the use of the water.

By s. 27 certain sections of the Land Clauses Consolidation Act, 1845, are incorporated, but as they are not set out in the

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joint appendix nor referred to in the judgments of the Courts below, their Lordships assume that they have no bearing upon the questions raised by the present appeal.

By the Esquimalt Waterworks Extension Act, 1892, s. 1, the Act of 1885 "shall be so construed as to give power" to the appellants "to divert and appropriate so much of the waters of Goldstream River and its tributaries as they may deem suitable and proper, subject, however, to any grant of rights, privileges, or powers arising under the provisions of the Corporation of Victoria Waterworks Act, 1873." By s. 3 "all rights, powers and privileges conferred on the said company by the" Act of 1885 shall extend and apply to "the appropriation and diversion of the waters of the Goldstream River and its tributaries, and also to the conveying of such water from the place or places of diversion" to the town of Esquimalt and the peninsula aforesaid, "in the same way and to the same extent as if such rights, powers and privileges had been originally conferred" by the Act of 1885.

The Corporation of Victoria Waterworks Act, 1873, gave powers to the corporation of Victoria at any time thereafter to appropriate any lands or waters within twenty miles of Victoria which they might require for the purpose of establishing waterworks of their own, and provided machinery for ascertaining the compensation to be paid in such case to any person or body politic with whose rights they might interfere. They, however, have not proceeded under this Act, for the obvious reason that, if they did so, they would have to pay for what they contend they can get under a later general Act without paying for it, and it is mentioned only to clear it out of the way.

The Esquimalt Waterworks Extension Act, 1892, further provided by s. 10 that the corporation of Victoria might at any time require the appellants to deliver into the water mains of the city of Victoria, at a stated pressure and at prices fixed by the Act, any quantity of water not being less than 500,000 and not more than 5,000,000 gallons per diem, together with water for fire protection at a fixed price, and water for flushing and washing gutters and for filling tanks for fire protection free of charge.

On the same day that this Act received the Royal Assent it was given also to the Water Privileges Act, 1892, by s. 2 of which it is enacted that "the right to the use of all water at any time in any river, watercourse, lake, or stream, not being a navigable river or otherwise under the exclusive jurisdiction of the Parliament of Canada is hereby declared to be vested in the Crown in the right of the province, and save in the exercise of any legal right existing at the time of such diversion or appropriation no person shall divert or appropriate any water from any river, &c., excepting under the provisions of this Act or of some other Act already or hereafter to be passed," and with some other exceptions not material to the present question.

This Act, however, was repealed by s. 154 of the Water Clauses Consolidation Act, 1897, by s. 4 of which the right to the use of all "unrecorded water"—a term to be explained presently—at any time in any river, lake, or stream is declared to be vested in the Crown "in the right of the province." The rest of the section is a re-enactment in the same words of the portion of s. 2 of the Water Privileges Act, 1892, beginning "and save"—already set out—with similar exceptions with which this case is not concerned.

Under this Act any person desirous of using water in excess of ordinary riparian rights may, by a procedure which it is unnecessary to detail, obtain from the Commissioner appointed under the Act a "record," or entry in an official book kept for the purpose, of the water which he seeks to appropriate—of its sources, extent and other necessary particulars—and upon obtaining such record may divert and appropriate the water described in the record. By s. 40 "any municipality may from time to time obtain one or more records of the unrecorded water in any streams or lakes as a source or sources of supply for a projected waterworks system."

It is under this provision that the respondents are seeking to proceed, treating the waters of Goldstream River below a certain point and the waters of Niagara Creek as "unrecorded water" within the meaning of the Act. But, before discussing the interpretation of "unrecorded water" given by the interpretation section of the Act, it will be convenient to

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state the facts relating to the waters in question, and to what the appellants have done under their statutory powers.

Goldstream River took its origin in 1885, and before any works were executed by the appellants, in a series of swamps rather than lakes. In winter it was a stream, apparently of considerable dimensions. In summer it dwindled to a thread, or died out altogether. Its origin lay to the west or north-west of Esquimalt and Victoria, but as it approached Esquimalt Harbour (though at a considerable distance from it) near a point where it was joined by one of its tributaries, called Waugh Creek, it took a turn to the north and finally entered an arm or inlet of the sea called Finlayson Arm or Saanich Inlet. Near its embouchure it was joined by a tributary called Niagara Creek, which has its origin in a small lake to the west of Saanich Inlet called Niagara Lake.

The appellants have constructed dams and other works upon the upper waters of the Goldstream River, the effect of which is to add several hundred acres to the natural storage capacity. They have also bought the land on both sides of the river forming the watershed, have constructed an artificial channel more than a mile long, and laid down a pipe about half a mile long to carry the waters to a reservoir which they have made. From this reservoir they have laid down another pipe about a mile long, and have expended upon these works several hundred thousand dollars.

These works would appear to have been necessary in some considerable measure in consequence of the obligation imposed upon them by s. 10 of their Act of 1892 to supply within fifteen months after notice, if required, 5,000,000 gallons per day to the city of Victoria. No doubt the appellants hoped also to have an increasing demand for water in Esquimalt itself and the peninsula, but these expectations, if they existed, have not been realized, and at present the only use that has been made of the water and of the artificial works for its collection and distribution has been to supply a large quantity to the power-house of the British Columbia Electric Railway Company, Limited, situated on the Goldstream River, about a mile and a half before it turns to the north and some miles from the city of

Victoria. From the power-house it is discharged into the Goldstream River, and if the city of Victoria required a supply under s. 10 of the Act of 1892, it would be necessary to construct at the point of discharge another reservoir and to lay down far larger pipes than would be wanted for Esquimalt, at a cost of about $300,000. No demand for any supply has been made by the respondents, and as the supply from Thetis Lake and Deadman's River is at present adequate to the demands of Esquimalt and the peninsula, the appellants have not yet made this reservoir or laid down any pipe, and the discharged water simply runs down into the old bed of the river and is so carried away to the sea.

In respect of the water from Niagara Creek the appellants have made surveys to ascertain the nature and extent of the supply, and have had plans prepared to carry the water—storage in Niagara Creek being impossible—in a ditch to the Goldstream River, and across it to Waugh Creek, whence it would fall into and become part of the general supply. They have also canalized Waugh Creek for about a mile.

The respondents claim that the waters from the Goldstream reservoirs and river after its discharge below the power-house, and also the whole of the waters of Niagara Creek, are "unrecorded water" and can be "recorded" in their favour under the Act of 1897.

The first question is whether that Act has any application to the appellants. In their Lordships' opinion it has none.

The Esquimalt Waterworks Act of 1892 has imposed upon the appellants a perpetual obligation of very serious extent, and it would seem natural that the means granted them to comply with that obligation should be correspondingly perpetual. It is clear from s. 3 of their Extension Act of 1892 that their rights are exactly the same, provided the conditions of s. 10 be observed, as if they had been conferred by the Act of 1885. We have therefore, from the passing of the Act of 1892, a private Act dating back to 1885 by which the appellants are placed under obligations as to which the natural inference from the Acts themselves and from the history of the case is that they could not be certain of being able to perform them without the two sources of supply in question.

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One of the reasons for executing the extensive works on the Goldstream River must have been that it was necessary for them at once to be in a position, with the help of such minor works as could be constructed at any time within fifteen months, to supply the maximum quantity of water which the respondents could demand. The necessary works in connection with Niagara Creek were very much simpler, and when the necessary surveys and plans had been made there was no reason why the appellants should not wait, as to them, till the need actually arose.

It is true that by s. 10 of the appellants' Act of 1885, in order to vest in them the waters they were entitled to appropriate, it was necessary that these waters should be "ascertained, set out, or appropriated." In the case of the Goldstream River every act was done by which not only one, but each of the three of these conditions was fulfilled, and it is difficult to see what more they could have done to vest these waters in the company "for ever," according to the terms of s. 10.

As to the waters of Niagara Creek, there is in their Lordships' opinion abundant evidence to shew that the "privileges and waters" now in question were ascertained and set out by the appellants, which is quite sufficient to satisfy the section. The vesting is not made subject to ascertainment or payment of compensation, and as in respect of Niagara Creek no person's enjoyment, whether rightful or not, has at present been interfered with, it is not surprising that the provisions for compensation have not been resorted to by anyone.

Nor can their Lordships agree that because the water below the power works on the Goldstream River is not yet used by the appellants it has ceased to be theirs. The Act of 1885 is not ambiguous. It vests in them such waters as have been ascertained, set out, or appropriated, and their Lordships fail to see how the waters which have been collected by the appellants cease to be their waters at any point within the limits of ascertainment. The deeds put in evidence shew that the lands on each side of the whole course of the Goldstream River were bought by the appellants, and there can be no doubt that the waters of the Goldstream River from their source to the discharge into Saanich Inlet are comprehended under the vesting enactment.

It is equally clear that the waters of Niagara Creek became under the same enactment vested in the appellants, and they must remain so unless they can be dealt with by the respondents under the Act of 1897.

It is a sufficient answer to any such contention to say that the appellants' Acts of 1885 and 1892 are private Acts, in the sense that they confer special rights and impose special obligations upon a particular company for special purposes; and to hold that a subsequent general statute, the application of which might seriously interfere with the rights granted by special legislation to the appellants and might prevent them from fulfilling statutory obligations, can have been intended to override the special legislation would be contrary to sound and well-established principles; and if ever there was a case in which these principles ought to be observed the present is such an instance, for the result of the respondents' contention might be that the appellants could not perform the obligations of s. 10, and in that case, under the provisions of s. 10 of the Act of 1892, the condition being violated, the rights and privileges which had involved the costly outlay above mentioned would be gone.

Their Lordships are further of opinion that the waters in question do not fall within the definition of unrecorded water in s. 2 of the general Act of 1897.

The definition runs as follows: "'Unrecorded water' shall mean all water which for the time being is not held under and used in accordance with a record under this Act, or under the Acts repealed hereby, or under special grant by public or private Act, and shall include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose."

The term "record" was not new. It appears first in the Land Act, 1888 (repealed by the Act of 1897), and the procedure by which it was obtained and the nature of the rights secured thereby were practically the same in three of the Acts repealed by s. 154 of the Act of 1897 as under that Act.

The first part of this definition is clear enough. It can have no other meaning than, "unrecorded water" shall mean all water which is not held under and used in accordance with

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a record under this Act, or [*with a record*] under the Acts repealed hereby, or [*is not held*] under a special grant by public or private Act; for the words "under special grant," &c., if supposed to be attached to "a record," would be hardly intelligible, and they must therefore be read as connected with the earlier words, "is not held."

Such water as that now in question is held under special grant by what is called in the clause a "private" Act, and is therefore not within the meaning of "unrecorded water" at all; and the subsequent expression, "and shall include all water . . . . unappropriated or unoccupied or not used for any beneficial purpose," whatever its application may be, cannot in their Lordships' opinion be intended to refer to water already declared to be outside the definition of "unrecorded water." This view is borne out by s. 4 of the same Act, which is clearly meant to preserve any right of diversion or appropriation existing under the provisions of any Act already passed.

The respondents raised yet another point, which was but feebly pressed in argument—that under the Act of 1897 all such questions as the present were intended to be decided, subject to certain rights of appeal, by the Commissioner to be appointed under the Act. Their Lordships, however, can see in the Act no ground for saying that the appellants, who contend that they are outside the Act altogether, should not be entitled to apply to a Court having jurisdiction to give effect to that contention, in limine, if well founded.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and the judgment of the Full Court reversed with costs, and the judgment of the trial judge restored. The respondents must pay the costs of this appeal.

Solicitors for appellants: *Hepburn, Son & Cutcliffe.*
Solicitors for respondents: *Burgess, Taylor & Tryon.*

[PRIVY COUNCIL.]

CABOT . . . . . PLAINTIFF; J. C.*

AND 1907

THE ATTORNEY-GENERAL OF QUEBEC . INTERVENANT. *July* 9, 10, 31.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Grant from the Crown—Claim of Grantee to Exclusive Right to fish from the Foreshore—Construction.

The appellant, as grantee of the lands in suit from the French king "with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along its frontage on the seashore," claimed the exclusive right to fish salmon from the foreshore along their boundary:—

Held, that, on the true construction of the grant, the claim could not be sustained. The above clause was ineffectual to pass the exclusive use of the foreshore so far as fishing is concerned.

APPEAL from a decree of the above Court (March 10, 1906), affirming a decree of the Superior Court for Lower Canada in the county of Gaspé in the province of Quebec (September 10, 1904), and dismissing the appellant's action.

The issue in the case was whether the original grant under which the appellant claimed to be the owner of a seigniory known as "la Grande Rivière" conferred upon him the sole and exclusive right of fishing in the waters of the Gulf of St. Lawrence in front of the boundary of the seigniory.

The seigniory has about four miles and a half frontage and a depth of about six miles. It abuts on the Gulf of St. Lawrence near the entrance of the Bay des Chaleurs. A river called the Grande Rivière flows through it and empties into the gulf.

The defendant Carbery, by virtue of fishing licences duly issued to him by the Government of the province of Quebec, claimed the right to fish in the waters of the gulf in front of the seigniory.

The respondent was allowed to intervene in the action brought

* *Present:* LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, SIR HENRI ELZÉAR TASCHEREAU, and SIR ALFRED WILLS.

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by the appellant to enforce his claim, and denied that the grant was effectual to pass the exclusive right unless there were expressed words to that effect, and that no such words were in either the original grant of 1657 or in the confirmatory grant of 1750.

Macmaster, K.C., and *Garneau, K.C.*, for the appellant, contended that the exclusive right claimed passed under the terms of the grants as a principal right of the concession which was en toute propriété, and was not merely an accessory to some other right the subject of the grant. There had been uninterrupted possession of the right, and the Government of the province had no right to grant the licences complained of to the defendant Carbery. The Act 18 Vict. c. 3, which abolished feudal rights, did not affect fishery rights: *Fraser* v. *Fraser*. (1)

Sir E. Carson, K.C., *Lanctot, K.C.*, and *Hamar Greenwood*, for the respondent, contended that the foreshore was not included in the grants, and that the exclusive right of fishing claimed did not pass by the grant of a seigniory unless such right had been by express words included in the grant. Those words were wanting in both the grants relied upon.

Macmaster, K.C., replied.

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The judgment of their Lordships was delivered by

LORD ROBERTSON. In 1898 the appellant purchased the seigniory and fief of Grand River, in the county of Gaspé, as described in the original deeds of concession, made of the said seigniory by the king of France, and containing about two leagues in front of the whole depth, and bounded, in front by the Gulf of St. Lawrence, in rear by the township Rameau, on one side towards the west by the seigniory of Pabos, with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along its frontage on the seashore. Other words follow, and other exceptions from the grant; but the real question is whether a grant of the king of France, to which the appellant admittedly has right, gives him the exclusive right to fish salmon ex adverso of the

(1) (1893) R. J. Q. 2 C. B. R. 215.

lands which are the primary subject of the grant. The Crown, in virtue of its ordinary and original right, has granted licences to certain persons to fish for salmon from the foreshore in question; and the pretension of the appellant is that the words of his grant from the French king gave him this exclusive right. It is necessary to keep in mind that, while, formally, there is a plea that the possession has been according to the appellant's construction of the title (that is, exclusive on the part of the appellant), there is no evidence of this, and it was not maintained in argument.

The sole question is therefore of the effect of the grant of the French king, which in two forms, differing only in immaterial points, are set out in the Record. The appellant indicated that he had an argument on certain words "en tirant du costé du Cap Espoir vers l'Ile Percée," which, he contended, extended the boundaries of the grant of fishing beyond high-water mark. The fatal defect of this argument is that the words supposed to imply extension are equally applied to the grant of land as to the grant of fishing. And, indeed, the true meaning and use of the words "tirant vers" (according to so high an authority as Littré) is no more than to indicate the direction.

The question is therefore reduced to a very general one, which is quite settled in the law of Canada, and that is, what is the meaning of the words "avec droit de chasse, pesche et traite avec les sauvages dans toute l'étendue de la dite concession"? The effect of such a grant is defined in a passage cited in the judgment under review, and the soundness of the law so laid down is not impugned by the appellant. "Le droit de pêche formait partie du fonds commun de la colonie, mais sous la garde du roi, pour l'avantage de tous, et ne pouvait devenir exclusif sans quelque concession spéciale exprimée dans des termes plus formels que ceux qui se trouvaient dans la simple formule mentionnée plus haut," and the "simple formula," in that case, was exactly that which is now under consideration. While the question is thus discussed under somewhat abstract terms, it is always to be remembered that the exclusive right claimed (and never exercised) implies a grant by the Crown of the exclusive use of the foreshore so far as fishing is concerned. All the arguments

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offered to their Lordships about the relative importance of fishing and land in such cases as the present were fully in view (and at less distance of time) of the Canadian jurists who have thus stated and developed the law. The appellant received no support from the Canadian Courts, and their Lordships are entirely unable humbly to advise His Majesty otherwise than that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Hills & Halsey.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1907 *July* 10, 11, 31.

TOWNSEND . . . . . Appellant;

AND

COX . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

(TWO APPEALS CONSOLIDATED.)

Canada Temperance Act (51 *Vict. c.* 34), *s.* 10—*Issue of Search Warrant before Prosecution—Writ of Certiorari refused—Practice as to special Leave to appeal in Criminal Cases.*

Under the Canada Temperance Act, 1888 (51 Vict. c. 34), a search warrant was issued and duly executed, and large quantities of intoxicating liquor found on the hotel and premises searched and a conviction of the appellant subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor:—

Held, that, the Supreme Court having dismissed applications for writs of certiorari to remove into the said Court the record of the said search warrant and destruction order, special leave to appeal therefrom must be refused. The decision was plainly right, having regard to s. 10 of the Act under which the warrant was issued.

Consolidated appeals from an order of the Supreme Court (April 11, 1906), dismissing the appellant's application for writs

* *Present:* Lord Robertson, Lord Collins, Sir Arthur Wilson, Sir Henri Elzéar Taschereau, and Sir Alfred Wills.

of certiorari to remove into the said Court the search warrant mentioned in their Lordships' judgment, and dated September 23, 1905, and also the destruction order dated September 26.

At the time the warrant was issued no information had been sworn charging the appellant with an offence against the Canada Temperance Act (R. S. C. 1886, c. 106, as amended by 51 Vict. c. 34, and 4 Edw. 7, c. 41).

A question arose as to the power to issue a search warrant under the Act before prosecution brought. On this point it had been held prior to the Act in the Courts of Ontario and Nova Scotia that there was no such power. The issue of a warrant was a proceeding in aid, and not an original proceeding under the Act: see *Reg.* v. *Doyle* (1); *Gallihew* v. *Peterson*. (2)

The Supreme Court refused the writs prayed by the appellant, but gave appeal to His Majesty in Council. The respondent applied to set aside this leave, and the appellant applied for special leave in the event of its being held that the leave given was ultra vires. No order was made on either application, both points being left open on the hearing of the appeals.

Sir R. Finlay, K.C., and *Rowlatt* (*J. J. Power, K.C.*, with them), for the appellants, contended that the judgment of the Supreme Court should be reversed. They referred to the Canada Temperance Act, ss. 99—105, and to the amending Act, 51 Vict. c. 34, ss. 6—8; to ss. 108 and 109 of the former Act, as amended by ss. 10 and 11 of 51 Vict. c. 34; and to the construction put upon the sections of the Act of 1886 in *Gallihew* v. *Peterson* (2); *Reg.* v. *Doyle* (1); *Reg.* v. *Walker*. (3) They contended that 51 Vict. c. 34 did not vary the Act of 1886 for the purpose of the present question, but on its true construction and effect re-enacted its provisions as judicially interpreted. By the true construction of either Act a search warrant can only be issued by a judicial authority before whom a prosecution has been commenced. Otherwise goods seized under a warrant might never come before a Court having authority to deal with them. The Temperance Act, 1906, c. 32, ss. 131, 133

(1) (1886) 12 Ont. Rep. 347. (2) (1887) 20 Nov. Sc. R. 222.
(3) (1887) 13 Ont. Rep. 83.

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and 136, was also mentioned, and *Wentworth* v. *Mathieu* (1) referred to.

Newcombe, *K.C.*, and *Frank Russell*, for the respondents, contended that the Supreme Court had no power to give leave to appeal. On the merits they relied upon s. 10 of the Act of 1888, which repealed s. 108 of the former Act, authorizing the issue of the search warrant, and re-enacted it in a different form, leaving out the words on which the decisions quoted by the appellant turned, viz., "before whom any prosecution for an offence against the provisions of the second part of this Act is brought." They contended that such omission was deliberately made with a view to those decisions, and that since the Act of 1888 it is lawful to issue a search warrant although no prosecution is pending. Certiorari does not lie to bring up intermediate proceedings in a case where a final conviction has been made which the appellant does not include in his application. They referred to *Reg.* v. *Fletcher* (2); *R.* v. *Roddy* (3); *R.* v. *Sainsbury* (4); *Reg.* v. *McCrae* (5); *R.* v. *Gillyard* (6); to the English Licensing Act (37 & 38 Vict. c. 49), s. 17; and to *Gill* v. *Bright*. (7) Special leave to appeal ought not to be granted in this case, and in its absence the appeals are incompetent: *In re Dillett* (8); *Ex parte Deeming* (9); *Ex parte Kops* (10); *Ex parte Carew* (11); Safford and Wheeler's Privy Council Practice, pp. 756, 757; Canadian Criminal Code, 1892, s. 751.

Rowlatt replied.

1907 *July* 31.

The judgment of their Lordships was delivered by

LORD COLLINS. These cases come before this Board under the following circumstances:—

The appellant is an hotel keeper at Kentville, Nova Scotia, where the Canada Temperance Act, 1888 (51 Vict. c. 34), was at all material times in force.

On September 23, 1905, in consequence of an information

(1) [1900] A. C. 212.
(2) (1876) 2 Q. B. D. 43.
(3) (1877) 41 Upper C. Q. B. 291, 302.
(4) (1791) 4 T. R. 451, 457.
(5) (1898) 28 Ont. Rep. 569.
(6) (1848) 12 Q. B. 527.
(7) (1871) 41 L. J. (M.C.) 22.
(8) (1887) 12 App. Cas. 459.
(9) [1892] A. C. 422.
(10) [1894] A. C. 652.
(11) [1897] A. C. 719.

laid before two justices by the respondent under that Act, a search warrant was issued to search the said hotel and premises for intoxicating liquor suspected to be kept for sale thereon. On September 25 the search warrant was duly executed, and large quantities of intoxicating liquor were found thereon and brought before the justices to be dealt with according to law. On the same day the respondent laid an information before two justices, charging the appellant with unlawfully keeping for sale on September 25, at Kentville aforesaid, intoxicating liquor contrary to the provisions of the Canada Temperance Act, and issued a summons, calling on the appellant to appear on September 26 to answer such last-mentioned information. On September 26 the appellant was tried and convicted of having unlawfully kept for sale intoxicating liquor on September 25 in his said hotel and premises, and was fined accordingly, and on the same day the said two justices, having duly convicted the appellant as aforesaid, declared the said liquor and the vessels in which the same was kept to be forfeited to His Majesty, and ordered the destruction thereof. The appellant applied to the Supreme Court of Nova Scotia for a writ of certiorari to remove into the said Court the record of search warrant of September 23, and also for a like writ to remove into the same Court the record of order for destruction of liquor of September 26, aforesaid. The Supreme Court dismissed each application, Weatherbe C.J. dissenting. Subsequently leave was obtained from the Supreme Court to appeal to His Majesty in Council against each of the said orders. The respondent thereupon petitioned His Majesty in Council that the orders admitting the appeals might be set aside. On the hearing of these petitions their Lordships directed them to stand over till the hearing of the appeals, with an intimation that, if at the hearing there should appear to be substantial doubt as to whether the appeals were or were not properly brought without special leave, and if their Lordships should then be of opinion that it was a case for granting special leave, they would be prepared to order accordingly.

On July 10 the appeals came on before their Lordships, who decided to hear the cases on the footing that the appellant had

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lodged petitions for special leave to appeal. Accordingly the facts and arguments were fully discussed before their Lordships. In the judgment of this Board delivered by Lord Watson in *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal* (1) there is the following passage: "A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

Without venturing to predicate of these appeals any of the propositions in the earlier part of the sentence, their Lordships are clearly of opinion that the last part of the sentence is directly applicable to them. The chief ground of appeal to the Supreme Court was that with respect to the search warrant certain cases had decided that such a warrant could only issue as ancillary to a prosecution already commenced. It was undoubtedly true that certain cases had so decided, but in the following year the Legislature intervened and amended the Act under which the search warrants in those cases had been issued by striking out the words on which the Courts had founded their opinion that the commencement of a prosecution was a condition precedent to the issue of a search warrant, and it is under the amended Act that the proceedings now in question took place. Their Lordships cannot doubt that the Legislature by this simple and artistic amendment intended to make it impossible to ground a similar contention on the amended sections. Without, therefore, inquiring further into the reasons which have been urged against the granting of special leave in these cases, their Lordships are content to rest their decision upon the authority above cited.

Their Lordships are therefore of opinion that these are not cases in which they would have been disposed to advise His Majesty to grant special leave to appeal, and they will accordingly humbly advise His Majesty to dismiss the appeals.

(1) (1889) 14 App. Cas. 660, at p. 662.

The appellant will pay the costs of the appeals, including the costs of the respondent's above-mentioned interlocutory petitions.

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Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } APPELLANT

AND

CURATOR OF INTESTATE ESTATES . . . RESPONDENT.

J. C.* 1907 *June* 18, 19; *July* 31.

AN APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Life, &c., Insurance Act, 1902, *s.* 4—*Crown not bound by the Act—Prerogative Right to Priority of Payment.*

Sect. 4 of New South Wales Life, Fire and Marine Insurance Act, 1902, purports to protect the proceeds of a life assurance policy from payment of the debts of the deceased:—

Held, that, whatever the true construction and effect of the section, the Act itself did not bind the Crown, which was entitled to be paid and by virtue of its prerogative to be paid in priority to all other creditors of the deceased.

APPEAL by special leave from an order of the Supreme Court (February 20, 1906), affirming by a majority an order of the judge in probate dismissing a petition of the appellant that the respondent should pay to him 68*l.* 2*s.* 2*d.* under the circumstances stated in their Lordships' judgment.

The Courts below held that the Insurance Act of 1902 was by necessary implication binding on the Crown, and that the policy moneys in the respondent's hands were protected from the appellant's claim.

Wise (*K.C.* of New South Wales) and *Vaughan Hawkins*, for the appellant, contended that the Act of 1902 was not binding on

**Present:* THE LORD CHANCELLOR, LORD ASHBOURNE, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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the Crown. The Crown was not mentioned in any part of the Act, and there was neither necessary nor reasonable implication from its provisions that the prerogative right of the Crown to priority of payment of its claims was intended to be affected thereby. There was nothing in the Act to exempt the respondent from process at the suit of the Crown. The Court below ought, therefore, to have directed the respondent to satisfy the Crown's claim out of the policy moneys in his hands. Sects. 4 and 7 of the Act, moreover, must be read together, and on their true construction only enured for the benefit of the wives and families of insured: see also s. 117. Reference was made to *In re Henley & Co.* (1); *Taxation Commissioners* v. *Palmer* (2); *Anderson* v. *Egan.* (3)

W. Wills, for the respondent, contended that, having regard to the object and purpose of s. 4 of the Act of 1902, it was by its true construction, as well as by implication therefrom, binding on the Crown, and disentitled the appellant from maintaining his claim. The broad policy of this and kindred provisions was that the insurance fund created by the providence of the subject should be absolutely safe from all creditors, both during the life of the insured and in the hands of his personal representatives. As regards the claim that prerogative right should virtually override the express provisions of the Act, the authorities do not state the rule as to whether or not the Crown is bound by an Act very clearly. It is admitted that it may be bound by implication. Reference was made to the judgment of Cockburn C.J. in *Mayor, &c., of Weymouth* v. *Nugent.* (4) It was argued—(1.) that on the true construction of this Act it was intended that the Crown should be bound; (2.) no prerogative right is thereby divested or taken from the Crown, nor is any burden imposed on the Crown nor any of its proprietary rights affected; (3.) that where an Act is for the public good, the Crown is bound so far as it is necessary to carry out the purposes of the Act. As to (2.) see *Ex parte Postmaster-General* (5), and a passage from Bacon's Abridgment, cited by

(1) (1878) 9 Ch. D. 469.
(2) Ante, pp. 179, 182, 184.
(3) (1905) Commonwealth L. R., vol. 3, pp. 269, 273, 274.
(4) (1865) 34 L. J. (M.C.) 81; S. C. 6 B. & S. 22.
(5) (1879) 10 Ch. D. 595.

Jessel M.R. on p. 601, to the effect that the King is not bound unless expressed to be bound where any prerogative right is affected, but is bound, though unnamed, if the Act is for the public good; see *Magdalen College Case.* (1) See also *Dixon* v. *Farrer* (2); Maxwell's Interpretation of Statutes, 3rd ed. p. 186; *Rex* v. *Archbishop of Armagh* (3); *Rex* v. *Wright* (4); *Baron de Bode* v. *Reg.* (5); *Théberge* v. *Laudry.* (6) This Act of 1902 is taken as to some sections bodily from 25 Vict. No. 13, a preceding Act having been passed in 1857. Reference was made to *Reg.* v. *Tait* (7); *Re Adams' Estate* (8); *Anderson* v. *Egan.* (9) On the construction of the Act it was contended that the annuity claimed was for the benefit of all the next of kin of the assured, and that there was no reason for limiting it to wives and families.

Wise, K.C., replied, citing *Attorney-General* v. *Donaldson.* (10)

1907 *July* 31.

The judgment of their Lordships was delivered by

Sir Arthur Wilson. The facts necessary for the disposal of this appeal are few and are not in dispute. One Andrew Mattson was in October, 1902, admitted, as an insane patient, to the Hospital for the Insane at Callan Park, in New South Wales, and he there remained until his death, on or about July 5, 1904. He had, on February 16, 1893, effected an insurance on his own life for the sum of 200*l.* with the Colonial Mutual Life Assurance Society. The policy was payable at the expiration of twenty years, or sooner death of the deceased. Mattson died without issue, unmarried, and intestate. His nearest relatives appear to be brothers and sisters, residing some in Sweden and some in America.

The respondent, who is the Curator of Intestate Estates, obtained an order from the Supreme Court in its Probate Jurisdiction, on August 22, 1904, to collect the estate of the deceased Mattson, and under that authority he received the proceeds of

(1) (1617) 11 Rep. 74b.
(2) (1886) 17 Q. B. D. 658; S. C. 18 Q. B. D. 43.
(3) (1722) 1 Stra. 516.
(4) (1834) 1 A. & E. 434.
(5) (1848) 13 Q. B. 364.
(6) (1876) 2 App. Cas. 102.
(7) (1889) 10 N. S. W. R. Eq. 232.
(8) (1894) 15 N. S. W. R. Bankruptcy and Probate, 135.
(9) 3 Commonwealth L. R., p. 269.
(10) (1842) 10 M. & W. 117.

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the policy which has been mentioned, Mattson having left no other estate.

During the time that Mattson was in the asylum he was maintained out of the public revenue, and a sum of 68*l.* 2*s.* 2*d.* is due to the Crown in that behalf. The Master in lunacy, on behalf of the Crown, claimed from the Curator that sum of 68*l.* 2*s.* 2*d.* The Curator refused to allow the claim, on the ground that the proceeds of the policy were protected from the claim by the provisions of the Life, Fire and Marine Insurance Act, 1902. Thereupon the Attorney-General, at the instance of the Master in lunacy, petitioned the Supreme Court for an order directing the Curator to pay the amount claimed out of the funds in his hands.

The petition was heard before Walker J., who held that the proceeds of the policy were protected against debts, and that this protection applied to debts of the Crown as well as to those of ordinary creditors, and accordingly he rejected the petition. The Attorney-General appealed against this decision to the Full Court, and in the Full Court the learned Chief Justice and Pring J. affirmed the decision of Walker J., Cohen J. dissenting. Against that decision the present appeal has been brought, special leave to appeal having been granted.

The section of the Life, Fire, and Marine Insurance Act, 1902, relied upon for the Curator of Intestate Estates is s. 4, which runs thus: "The property and interest of every person who has effected or shall hereafter effect any policy for an insurance bona fide upon the life of himself or any other person in whose life he is interested, or for any future endowment for himself or any other such person, and the property and interest of the personal representatives of himself or such other person in such policy, or in the moneys payable thereunder or in respect thereof and in the contributions made towards the same, shall be exempt from any law now or hereafter in force relating to insolvency or bankruptcy or from being seized or levied upon by or under the process of any Court whatever."

The rights of the Crown in such a case, unless they be affected by the provisions of the Act, are clear and indisputable. The Crown is entitled, not only to be paid, but, by virtue of its

prerogative, to be paid in priority to all other creditors. The law applicable to such cases is explained, in the judgment of this Board, in *Commissioners of Taxation for New South Wales* v. *Palmer*. (1)

The question therefore arises whether the present Act binds the Crown. The Crown is not named in it, nor can their Lordships see any clear indication of an intention to bind the Crown. Prima facie, therefore, the Crown is not affected by it.

Mr. Wills, who appeared for the respondent, in his able argument endeavoured to shew that the rule exempting the Crown from the operation of a statute which does not name the Crown, or shew a clear intention to bind the Crown, is not applicable to a statute which would not have the effect of imposing a burden on the Crown, or interfering with its property, or with some prerogative right belonging to the Crown and not shared by the subject; and he sought to shew that what the Insurance Act did was to protect the proceeds of insurance, and prevent their being made applicable to the payment of debts generally contrary to the general rule of law, interfering thus with the right, common to the Crown and the subject, to claim payment of the debts of the deceased out of his assets.

Their Lordships think it unnecessary to follow the legal argument of the learned counsel further, because if the present Act be held to bind the Crown it would directly take away, not only the right to claim payment of a debt, but the clearly prerogative right to priority of payment. Their Lordships are of opinion that, according to the settled principle applicable to such cases, the statute in question does not bind the Crown.

Another question was discussed during the argument before their Lordships, whether, apart from the prerogative of the Crown, and assuming the claim to have been one by a subject, the Act, properly construed, affords the degree of protection which has been contended for to the proceeds of insurance policies; whether s. 4 has not a much narrower effect than s. 8, the language of which is very different. By reason of the view which their Lordships have expressed on the other part of the case it is unnecessary that they should consider this question.

(1) Ante, p. 179.

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Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the judgments of Walker J. and of the Full Court should be set aside and an order made for payment by the Curator out of the funds in his hands to the Master in lunacy of the sum of 68*l.* 2*s.* 2*d.*, and to the Attorney-General of his costs in both Courts in the Colony.

There will be no order as to the costs of this appeal.

Solicitors for appellant: *Light & Fulton.*
Solicitors for respondent: *Burton, Yeates & Hart.*

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COMPANY—*Reduction of Capital—Extinguishment of Founder's Shares—Companies Acts*, 1862—1877.

To give the Court jurisdiction to entertain a petition for the reduction of capital it is not essential to prove that the capital which the company proposes to cancel is lost or unrepresented by available assets.

Creditors not being concerned, the only questions to be considered are: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the company? 2. Is the reduction fair and equitable as between the different classes of shareholders. POOLE *v.* NATIONAL BANK OF CHINA, LIMITED - - - - **H. L. (E.) 229**

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—— Railway company—Mines—Coal required to be left unworked - - - **400**
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—— Workmen's Compensation Act, 1897.
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CONSPIRACY — *Wrongful Acts — Injury — Injunction.*

The appellant brought an action in the Chancery Division (Ireland) against the respondent, claiming an injunction to restrain him from unlawfully and maliciously conspiring with other persons to injure the appellant in her business and employment:—

Held, that upon the facts proved there was no evidence to support the claim.

The decision of the Irish Court of Appeal, [1906] 1 I. R. 51, affirmed upon the above ground. SWEENEY (PAUPER) *v.* COOTE
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CONTRACT—*Action of Deceit—Fraudulent Representations—Verification of Representations by Contractor—Principal responsible for Fraud of Agent—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

A contractor having sued the other party to the contract (a public authority) in an action of deceit for damages for fraudulent representations made by the agent of the public authority as to the nature of the works to be executed. One defence was that by a provision in the contract the plaintiff must verify all representations for himself and not rely on their accuracy. Another defence was that the action was not brought in due time within the Public Authorities Protection Act, 1893:—

Held, that the contract, fully construed, contemplated honesty on both sides, and protected only against honest mistakes; and that the Public Authorities Protection Act, 1893, did not apply, the act complained of not being done in pursuance of a public duty within the meaning of the statute.

Decision of the Court of Appeal in Ireland, [1907] 2 I. R. 27, 82, reversed, and decision of the King's Bench Division (Ireland) restored upon the ground that there was a question of fact for the jury upon the allegation of fraud. The question of the liability of a principal for the fraud of his agent discussed. S. PEARSON & SON, LIMITED *v.* DUBLIN CORPORATION
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See under REVENUE.

DAMAGES — *Interdict too Wide—Measure of Damages.*

An interim interdict was obtained by the defenders against the pursuers, a mineral company, who owned a large shale and limestone mineral field and also large works for extracting and refining oils. The interdict restrained the pursuers from working and winning the seams of the shale and other minerals within forty yards of the defenders' water-pipes, which passed through the pursuers' property. The interdict was in force for eleven months, when it was recalled. During the eleven months shale to keep the works going could have been obtained from other sources, but only at an expense which would not have been profitable. The pursuers' capital in hand was limited, and prices in the oil trade were at the lowest point. In these circumstances the pursuers closed their works, with the result that their machinery deteriorated, their business connections were lost, and it was found impossible to restart the works after the recall of the interdict.

DAMAGES—*continued.*

In an action for damages for wrongous interdict, the First Division of the Court of Session gave the pursuers judgment for 27,000*l.* damages out of a claim for 137,000*l.* :—

Held (affirming the decision of the Court below, (1906) 8 F. 731), that the pursuers were not entitled to recover as damages the total loss consequent on the closing of their works ; that both parties were in fault ; and that the damages awarded were not insufficient. CLIPPENS OIL COMPANY, LIMITED *v.* EDINBURGH AND DISTRICT WATER TRUSTEES - **H. L. (Sc.) 291**

—— Collision—Dredger, Demurrage of—Measure of damages - - - - - **241**
See SHIPPING. 2.

DECEIT—Action of—Fraudulent representation—Public authorities protection - **351**
See CONTRACT.

DEMURRAGE — Collision — Demurrage of dredger—Measure of damages - **241**
See SHIPPING. 2.

DIGNITY—Surrender of peerage to Sovereign—Grant by Sovereign of surrendered peerage - - - - - - **10**
See PEERAGE.

DIRECTOR—Liability of director of bank - **101**
See PRIVY COUNCIL APPEALS. 12.

DISCHARGE—Seamen.
See under SHIPPING.

DISENTAILED, LANDS — Succession — Will—Residue of estate to heir entitled to succeed to entail—Intestacy - **440**
See SCOTTISH LAW. 5.

DIVESTING CLAUSE—"Born in my lifetime" Child en ventre sa mère - - **139**
See WILL. 1.

DIVIDED PARISHES AND POOR LAW.
See under POOR LAW.

DIVORCE—*Irish Divorce Bill—Access to Children—Practice.*

The House of Lords will approve of a clause in a divorce Bill giving the custody of the children of the marriage to the innocent party but will refuse to order that a provision shall be inserted in the clause giving the guilty party access to the children. Any such provision must be left for arrangement between the parties. KILLERY'S DIVORCE BILL (SECOND READING) **H. L. (I.) 306**

DREDGER—Demurrage of—Collision—Measure of damages - - - - - **241**
See SHIPPING. 2.

DUTY—Public revenue.
See under REVENUE.

EDUCATION.
See under SCHOOLS.

ELECTRIC LIGHT—Victorian Electric Light and Power Act, 1896—Powers of undertakers to vary rates of charge - **469**
See PRIVY COUNCIL APPEALS. 30.

ELECTRIC WIRES—Negligence in exercising statutory powers — Evidence—Quebec Act (1 Edw. 7, c. 66), s. 10 - - **454**
See PRIVY COUNCIL APPEALS. 13.

ELEMENTARY EDUCATION.
See under SCHOOLS.

EMPLOYER AND WORKMAN — *Arbitration — Weekly Payment ended by Arbitrator — Application to Review—New Circumstances—Power of Arbitrator to Review again—Res judicata—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37).

A workman having been injured by an accident in the course of his employment, his employer agreed to make him weekly payments to continue during his incapacity for work, "or until the same shall be ended, diminished, increased or redeemed in pursuance of the Workmen's Compensation Act, 1897." Upon an application for review and termination of the payment the arbitrator made an award that the weekly payments should be ended on the ground that the incapacity had ceased. The workman did not appeal, but afterwards applied for another arbitration with respect to the review and increase of the weekly payment on the ground that he was unable to work through the accident :—

Held (affirming the decision of the Court of Appeal), that the award ending the weekly payments was upon the true construction of it final.

Quære whether the claim of the workman can be kept alive in case of the incapacity recurring by an award which suspends instead of ending the weekly payments. NICHOLSON *v.* PIPER - - - - - **H. L. (E.) 215**

2. —— *Railway—Engine-driver — Workman killed while disobeying well-known Rule of Employer—"Serious and wilful Misconduct"—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37).

An engine-driver left the footplate of his engine and mounted the tender while the engine was in motion, in breach of a rule of the railway company prohibiting the act and well known to him, and was killed by collision with a bridge. In a claim by the widow for compensation the county court judge found upon the evidence that there was nothing to justify the driver in mounting the tender at the time in question, and that his act amounted, in fact, to "serious and wilful misconduct" within the Workmen's Compensation Act, 1897, and made his award in favour of the company :—

Held, that there was evidence upon which the judge might properly find as he did. BIST *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY - - - - **H. L. (E.) 209**

ENGINE-DRIVER—Workman killed while disobeying well-known rule of employer—Workmen's Compensation Act, 1897
See EMPLOYER AND WORKMAN. 2. **209**

EN VENTRE SA MÈRE—Child—Will—Construction—"Born in my lifetime"—Divesting clause - - - - **139**
See WILL. 1.

ESQUIMALT WATERWORKS ACT — Unrecorded waters—Law of British Columbia *See* PRIVY COUNCIL APPEALS. 3. **499**

ESTATE DUTY.
See under REVENUE.

EVIDENCE—Electric wires—Negligence in exercising statutory powers—Quebec Act, 1 Edw. 7, c. 66, s. 10 - - - **454**
See PRIVY COUNCIL APPEALS. 13.

—— Foreshore — Patent — Charter — User — Weight of evidence - - - **369**
See FORESHORE.

FAMILY ARRANGEMENT — Estate duty — Policy of life insurance—Interest provided by the deceased - - - **19**
See REVENUE. 1.

FINANCE ACT.
See under REVENUE.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FISHING—Grant from the Crown—Claim of grantee to exclusive right to fish from the foreshore—Appeal from Quebec **511**
See PRIVY COUNCIL APPEALS. 14.

FORESHORE — *Patent — Charter — User — Weight of Evidence.*
The property in the Merchants' Quay, in the creek of Kilrush, built in 1848 upon the foreshore by the respondent's predecessor in title, having been claimed by the respondent and also by the Crown :—
Held that, without deciding any questions of law, the weight of the evidence derived from user and documents shewed conclusively as a matter of fact that the quay was the property of the respondent.
Decisions of the Master of the Rolls and the Court of Appeal in Ireland, [1905] 1 I. R. 483, 509, affirmed. ATTORNEY-GENERAL FOR IRELAND *v.* VANDELEUR - - **H. L. (I.) 369**

—— Fish from the foreshore, Claim of grantee to exclusive right to—Grant from the Crown — Construction — Appeal from Quebec - - - - - **511**
See PRIVY COUNCIL APPEALS. 14.

FOUNDERS' SHARES — Extinguishment of — Reduction of capital - - - **229**
See COMPANY.

FRAUD—Contract—Action of deceit—Fraudulent representations—Public authorities protection - - - - **351**
See CONTRACT.

FUTURITY—Words of—Will—Construction—Gift to grandchildren in case any child "shall predecease me" - - **225**
See WILL. 2.

GLASGOW.
See under SCOTTISH LAW.

GRANDCHILDREN — Will — Construction — Words of futurity — Gift to grandchildren in case any child "shall predecease me" - - - - **225**
See WILL. 2.

HARBOUR — *Harbour Dues — Port — Limits of Port—Ships loading or unloading Goods within the Limits of Port—Fiscal or Customs Port—Commercial or Local Port—Natural Port artificially enlarged — Statute — Construction* — 33 *Geo.* 3, *c. cxxiii.*—49 *Geo.* 3, *c. xxiv.*
By two private Acts trustees were authorized to levy rates and duties upon ships loading or unloading "within the limits of the port of Carnarvon" :—
Held that, upon the true construction of the Acts, the words used meant the wider limits of the fiscal port, and not the limits of the local or popularly understood port of Carnarvon.
The decision of the Court of Appeal, [1906] 1 Ch. 179, affirmed. ASSHETON SMITH *v.* OWEN **H. L. (E.) 124**

—— Collision, Vessels crossing so as to involve risk of—Collision off the entrance to harbour - - - - - **193**
See PRIVY COUNCIL APPEALS. 8.

"**HEREDITAMENT**"—Income tax — Sewer — Vested in local authority - - **264**
See REVENUE. 3.

HOTEL—Lessor and lessee—Quiet enjoyment, Implied obligations as to — Printing machinery and hotel bedrooms - **476**
See PRIVY COUNCIL APPEALS. 28.

HUSBAND AND WIFE — Covenant to pay annuity—Right to annul the covenant on notice to trustee—Wife's waiver of notice valid - - - - **483**
See PRIVY COUNCIL APPEALS. 1.

ILLEGITIMATE CHILD—Settlement by residence—Irremovability - - **255**
See POOR LAW.

INCOME TAX.
See under REVENUE.

INDEMNITY — Ship — Charterparty — Bill of lading—Duty of master to sign—Bill of lading at variance with charterparty
See SHIPPING. 1. **272**

INJUNCTION — Conspiracy—Wrongful acts — Injury - - - - - - **221**
See CONSPIRACY.

—— Nuisance — Trade district — Printing machinery—Noise, Increase of—Residence - - - - - - **121**
See NUISANCE.

—— Trade name—Similarity of name - **430**
See TRADE NAME.

INLAND REVENUE.
See under REVENUE.

INSURANCE—Contract of—Limitation clause imported from original policy—Construction—Appeal from Canada - **59**
See PRIVY COUNCIL APPEALS. 6.

INSURANCE (FIRE)—Notice required of additional insurance—Premium - **96**
See PRIVY COUNCIL APPEALS. 18.

INSURANCE (LIFE)—New South Wales Life, &c., Insurance Act, 1902—Crown not bound by the Act—Priority of payment - - - - - - - **519**
See PRIVY COUNCIL APPEALS. 23.

—— Policy of life insurance—Estate duty—Interest provided by the deceased—Family arrangement - - - **19**
See REVENUE. 1.

INTERDICT—Damages—Interdict too wide—Measure of damages - - - **291**
See DAMAGES.

INTEREST—Income tax—Interest on borrowed money—Right to deduct and retain income tax - - - - - - **131**
See REVENUE. 2.

INTESTACY—Succession — Will — Residue of estate to heir entitled to succeed to entail—Lands disentailed - - **440**
See SCOTTISH LAW. 5.

IRISH DIVORCE BILL—Access to children—Practice - - - - - - **306**
See DIVORCE.

JUSTICES—Licensing Acts.
See under LICENSING ACTS.

—— Shops — By-law — Ultra vires — Power of magistrates to close shops at 10 P.M.
See SCOTTISH LAW. 2. **153**

LAND—New South Wales Acquisition Act **73**
See PRIVY COUNCIL APPEALS. 24.

LESSOR AND LESSEE—Quiet enjoyment, Implied obligations as to — Printing machinery and hotel bedrooms - **476**
See PRIVY COUNCIL APPEALS. 28.

LICENSING ACTS — *Licensing Justices — Provisional Licences with a view to Compensation—Bias on part of Justices — Qualification of Applicant for Licence—Person keeping or about to keep Alehouse — Beerhouse — Real resident Holder and Occupier—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 1—*Beerhouse Act*, 1840 (3 *& 4 Vict. c.* 61), *s.* 1.

A county borough corporation under statutory powers for the improvement of a district bought land in the borough, including licensed premises, dismantled the premises and put caretakers therein with a view to suppressing unnecessary licensed premises on payment of compensation to the corporation under the Licensing Act, 1904. At the next annual licensing sessions the caretakers, in pursuance of an arrangement between the corporation and the justices, applied for renewal licences, some under the Alehouse Act, 1828, and some under the Beerhouse Act, 1840. The licensing justices provisionally granted renewal licences subject to a reference to quarter sessions, the compensation authority under the Licensing Act, 1904, s. 1. It was contended that the renewals were void because the caretakers were not persons keeping or about to keep alehouses under the Alehouse Act, 1828, or real resident holders and occupiers

LICENSING ACTS—*continued.*
under the Beerhouse Act, 1840, and because some of the justices who granted the renewals were members of the corporation and parties to the arrangement:—

Held, that, the justices having honestly exercised their discretion and the transaction being bona fide and for the purpose of carrying out the object of the Licensing Act, 1904, the renewals were valid.

Decision of the Court of Appeal, *R.* v. *Woodhouse*, [1906] 2 K. B. 501, reversed, and decision of the King's Bench Division restored. LEEDS CORPORATION *v.* RYDER **H. L. (E.) 420**

2. —— *Refusal to renew Certificate—Evidence on which Magistrates entitled to act—Absolute Discretion of Magistrates—Licensing (Scotland) Act*, 1903 (3 *Edw.* 7, *c.* 25), *ss.* 11, 19, 20, 103.

The pursuer, a widow, by her condescendence averred that she was possessed of a house which had been licensed for fifty years; that in 1904 she applied to the licensing court under the Licensing (Scotland) Act, 1903, for renewal of her licence, that no complaint of the management or sanitary condition of the premises was ever made, nor any notice of objection given at any time prior to April, 1904; but at the licensing court on that date an inspector of police objected to the renewal on the ground that the premises were insanitary and the district congested; that he was not put on oath, nor was any evidence given as to either objection; that the pursuer through her agent offered to carry out any recommendation in regard to sanitary arrangements of the premises, but the court thereupon, without calling any evidence, refused to renew the certificate on the ground that the premises were insanitary and the district congested. She further averred that the licensing authority had prejudiced the question by having come to a resolution previous to the sitting of the court to reduce the number of licensed premises; and that an appeal to the licensing court of appeal was overruled by the same preconceived determination, and that no evidence was heard by the said court. She brought her action against the licensing authorities and town clerk of the burgh and the members of the licensing appeal court for non-performance of their duty:—

Held (affirming the decision of the First Division of the Court of Session, (1905) 7 F. 1009), that the discretion of the licensing authority was absolute when exercised within the limits of its statutory authority, and that the pursuer's averments set out no case of ignorance, prejudice or bias, or refusal to give the hearing prescribed by the Act of 1903; secondly, that the licensing court of appeal could give its decision without the appearance of any objector or evidence.

Lundie v. *Magistrates of Falkirk*, (1890) 18 R. 60, affirmed. BOYLE (*or* WALSH) *v.* WILSON **H. L. (Sc.) 45**

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHT — *Obstruction — Ancient Lights — Nuisance.*

The appellant built a house near the respon-

LIGHT—*continued.*
dent's house in a London suburb and thereby obstructed its ancient lights. In an action by the respondent against the appellant Kekewich J. found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room in question was "still a well-lighted room":—

Held, by Lord Loreburn L.C. and Lord James of Hereford (Lords Robertson and Atkinson dissenting), that there was evidence to justify the finding as to a nuisance, and that there was nothing in the decision inconsistent with the principle laid down in *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179.

The decision of the Court of Appeal, *Kine* v. *Jolly*, [1905] 1 Ch. 480, affirmed. JOLLY *v.* KINE **H. L. (E.) 1**

2. —— *Prescription—Dominant and Servient Tenements held under Common Landlord—Prescription Act*, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

Under s. 3 of the Prescription Act, 1832, where two adjoining tenements are held by different lessees under a common landlord, and one lessee has enjoyed the access and use of light in respect of his tenement over the other tenement for a period of twenty years without interruption, he acquires an absolute and indefeasible right to light as against that other tenement, and this right enures in favour of that lessee and his successors not only as against the adjoining lessee, but as against the common landlord, and all succeeding owners of the adjoining tenement.

Decision of the Court of Appeal, [1906] 2 Ch. 406, affirmed.

The doctrine applied in *Frewen* v. *Philipps*, (1861) 11 C. B. (N.S.) 449; and *Mitchell* v. *Cantrill*, (1887) 37 Ch. D. 56, was not affected by *Colls* v. *Home and Colonial Stores, Ld.*, [1904] A. C. 179, and has been too long acted on to be now disturbed. MORGAN *v.* FEAR **H. L. (E.) 425**

—— Electric light.
See under ELECTRIC LIGHT.

LOCAL GOVERNMENT — *Creation of County Borough — Loss of Borough's Contribution to County Expenses—Adjustment of Financial Relations—Compensation to County—Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 32, 62.

When a new county borough is created by separation of the borough from the county the financial adjustment between the borough and the county must not include compensation from either to the other for the loss of a contributing area.

Upon the true construction of the Local Government Act, 1888, the meaning of s. 32 is not that the entire financial position of the county and the county borough is to remain the same relatively to each other, but that it is to be so as regards the distribution of the Exchequer contributions; and that in adjusting the financial relations between the two bodies an equitable provision shall be made for imposing upon each its fair share of the burden, which was a joint burden and is no longer to be joint.

Decisions of Channell J., [1905] 2 K. B. 340, and of the Court of Appeal, [1906] 2 K. B. 186, reversed.

LOCAL GOVERNMENT—*continued.*
The reasoning of *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A. C. 171, adopted and applied. WEST HARTLEPOOL CORPORATION *v.* DURHAM COUNTY COUNCIL **H. L. (E.) 246**

MAGISTRATES.
See under JUSTICES.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MERCHANT SHIPPING.
See under SHIPPING.

MINE—British Bechuanaland Concession Court —Concessions by native chiefs before 1891 - - - - - - **186**
See PRIVY COUNCIL APPEALS. 16.

—— Railway company—Compensation — Coal required to be left unworked - **400**
See RAILWAY. 1.

MORTGAGE—Priority as between mortgagees depends upon date of advances, not of registration—Law of South Africa **336**
See PRIVY COUNCIL APPEALS. 17.

NAME—Trade name — Injunction —Similarity of name - - - - - - **430**
See TRADE NAME.

NATAL—Laws of.
See PRIVY COUNCIL APPEALS. 19—21.

NEGLIGENCE—Electric wires — Negligence in exercising statutory powers — Quebec Act, 1 Edw. 7, c. 66 - - - **454**
See PRIVY COUNCIL APPEALS. 13.

—— Liability of director of bank - - **101**
See PRIVY COUNCIL APPEALS. 12.

NEW SOUTH WALES—Laws of.
See PRIVY COUNCIL APPEALS. 22—27.

NEW ZEALAND—Laws of - - - **476**
See PRIVY COUNCIL APPEALS. 28.

NOISE — Nuisance — Trade district—Printing machinery—Noise, Increase of—Residence—Injunction - - - **121**
See NUISANCE.

NOTICE — Covenant to pay annuity— Wife's waiver of notice valid - - - **483**
See PRIVY COUNCIL APPEALS. 1.

—— Fire insurance—Notice required of additional insurance - - - - **96**
See PRIVY COUNCIL APPEALS. 18.

NOVA SCOTIA—Laws of - - - - **514**
See PRIVY COUNCIL APPEALS. 9.

NUISANCE—*Trade District—Noisy Neighbourhood—Printing Machinery—Noise, Increase of—Residence—Standard of Comfort—Injunction.*

To give a householder a right of injunction against a neighbour for carrying on a noisy business in a trade district the noise must amount to a nuisance, regard being had to the nature

NUISANCE—*continued.*
and habits of the neighbourhood and to the pre-existing noises.

The decision of the Court of Appeal, [1906] 1 Ch. 234, affirmed upon the facts. POLSUE & ALFIERI, LIMITED *v.* RUSHMER
H. L. (E.) 121

—— Liability for nuisance—Grant of statutory powers — Construction—Appeal from British Guiana - - - - - 330
See PRIVY COUNCIL APPEALS. 4.

—— Light—Obstruction—Ancient lights - 1
See LIGHT. 1.

—— Printing machinery and hotel bedrooms—Noise and vibration - - - 476
See PRIVY COUNCIL APPEALS. 28.

OBSTRUCTION—Ancient lights—Nuisance 1
See LIGHT. 1.

OMNIBUS BUSINESS—Railway company—Incidental powers—Ultra vires - 415
See RAILWAY. 2.

ONTARIO—Laws of.
See PRIVY COUNCIL APPEALS. 10, 11.

PARTNER—Probate duties—New South Wales Stamp Duties Act, 1898 — Share of deceased partner - - - - 449
See PRIVY COUNCIL APPEALS. 26.

PATENT—*Petition for Extension—Advertisement.*

Under the Patents Act, 1883, the Board has no power to entertain a petition for extension where there has not been any advertisement as prescribed by s. 25, sub-s. 1. It has no power to dispense with the express provisions of a statute. *In re* FRIEZE-GREEN'S PATENT - P. C. 460

2. —— *Prolongation—Petition by Assignee of Patents—Inventor dead—Prolongation refused.*

Where it appeared that the patented invention had no exceptional merit and involved no new principle, that the assignee of the patents had neither by himself nor his agents displayed suitable energy and business capacity in pushing them, and that the inventor was dead and could not possibly, if living, have derived advantage from their extension:—

Held, that their prolongation must be refused. *In re* VAN GELDER'S PATENTS. *Ex parte* THOMPSON - - - - P. C. 174

—— Foreshore — Charter — User — Weight of evidence - - - - - - 369
See FORESHORE.

PEERAGE—*Surrender of Peerage to Sovereign—Grant by Sovereign of surrendered Peerage—Honour—Dignity.*

A peer cannot surrender his peerage to the Sovereign in any manner; and this law must be applied to a surrender made in 1302.

In 1302 Roger le Bygod, Earl of Norfolk, surrendered the earldom to Edward I. In 1312 Edward II. granted to Thomas de Brotherton and to the heirs of his body the earldom so surrendered. Thomas de Brotherton was frequently summoned by writ to Parliament and sat there. Lord Mowbray, having proved his pedigree as senior co-heir of Thomas de Brotherton, alleged that the earldom had fallen into abeyance, and claimed that the abeyance should be determined in his favour as senior co-heir:—

Held, that the surrender by Roger le Bygod was invalid; that the charter of 1312 was consequently invalid; that the sitting in Parliament under the King's writ could not create an earldom; and that Lord Mowbray had not made out his claim. EARLDOM OF NORFOLK PEERAGE CLAIM (Committee for Privileges)
H. L. (E.) 10

POLICE—Shops—By-law—Ultra vires—Power of magistrates to close shops at 10 P.M.
See SCOTTISH LAW. 2. 153

POLICY.
See under INSURANCE, INSURANCE (FIRE) and INSURANCE (LIFE).

POOR LAW—*Settlement and Removal—Illegitimate Child — Settlement by Residence — Irremovability—Residence of Child under Sixteen with reputed Parent—Acquisition of Settlement under Sixteen—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 35—*Poor Removal Act*, 1846 (9 & 10 *Vict. c.* 66), *ss.* 1, 3—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111).

An illegitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its reputed father who is irremovable therefrom.

Decision of the Court of Appeal, [1906] 2 K. B. 240, affirmed upon the above ground. FULHAM PARISH *v.* WOOLWICH UNION
H. L. (E.) 255

PORT — Limits of — Harbour dues — Fiscal or customs port - - - - 124
See HARBOUR.

POWERS—Railway company—Omnibus business—Incidental powers—Ultra vires
See RAILWAY. 2. 415

PRACTICE—Appeal, Special leave to—Appeal from Natal - - - - - 461
See PRIVY COUNCIL APPEALS. 21.

—— Appeal, Special leave to, in criminal cases —Appeal from Nova Scotia - 514
See PRIVY COUNCIL APPEALS. 9.

—— Writ of certiorari refused—Canada Temperance Act - - - - - - 514
See PRIVY COUNCIL APPEALS. 9.

PRESCRIPTION — Light — Dominant and servient tenements held under common landlord - - - - - - 425
See LIGHT. 2.

PRINCIPAL AND AGENT—Contract—Action of deceit—Fraudulent representations —Public authorities protection - 351
See CONTRACT.

PRINTING—Nuisance—Trade district—Printing machinery—Noise, Increase of—Injunction - - - - - - **121**
See NUISANCE.

PRINTING MACHINERY—Hotel bedrooms—Lessor and lessee—Nuisance - **476**
See PRIVY COUNCIL APPEALS. 28.

PRIORITY — Bankruptcy — Administration of bankrupt's estate — Priority of the Crown—New South Wales Bankruptcy Act, 1898 - - - - - **179**
See PRIVY COUNCIL APPEALS. 22.

—— Mortgages—Priority as between mortgagees depends upon date of advances, not of registration—Law of South Africa **336**
See PRIVY COUNCIL APPEALS. 17.

—— New South Wales Life, &c. Insurance Act, 1902—Crown—Priority of payment **519**
See PRIVY COUNCIL APPEALS. 23.

PRIVY COUNCIL APPEALS — AUSTRALIA—*Annuity—Covenant to pay Annuity for Separate Use of Wife without Power of Anticipation—Right to annul the Covenant on Notice to Trustee—Wife's Waiver of Notice Valid.*

A deed of separation was executed in 1894 by the respondent and his wife, the former covenanting to pay to a trustee thereunder an annuity for the separate use of the latter without power of anticipation. Power was reserved to the respondent to give notice to the trustee after the expiration of twelve months from the date of the deed of his intention to pay a reduced amount, in which case, unless all the parties agreed as to the amount to be thereafter paid, the covenants in the deed should be void and of no further effect. Before the expiration of twelve months notice of such intention was given to the wife's solicitors, and the wife instructed them to waive the stipulated notice to the trustee.

In an action brought in 1904 to recover all arrears of annuity due under the deed as a still subsisting arrangement, the Supreme Court of the Colony decreed the amount, holding that the wife's waiver of notice to the trustee was in contravention of the restraint clause in the deed :—

Held, that the High Court rightly reversed this decree. On the true construction of the deed the restraint clause applied to the annuity so long as it was payable, but not to the notice. Personal service thereof on the trustee was a mere formality which the wife was entitled to waive. Otherwise it was inequitable that she should enforce an obligation from which she had induced her husband to omit to free himself in in the manner stipulated. MACNAGHTEN *v.* PATERSON - - - - - - **P. C. 483**

—— New South Wales—Laws of.
See Nos. 22—27, post.

—— Victoria—Laws of.
See Nos. 29, 30, post.

2. —— **BRITISH COLUMBIA** — *Vancouver Island Settlers' Rights Act*, 1904—*Construction*

PRIVY COUNCIL APPEALS — BRITISH COLUMBIA—*continued.*

—*Powers of Local Legislature—British North American Act*, 1867, *s.* 92, *sub-s.* 10.

The British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and thereunder a grant was made to the appellant of the lot in suit.

By an Act of the same Legislature in 1883, land which included the said lot had been granted with its mines and minerals to the Dominion Government in aid of the construction of the respondents' railway, and in 1887 had been by it granted to the respondents under the provisions of a Dominion Act passed in 1884 :—

Held, that the Act of 1904 on its true construction legalized the grant thereunder to the appellant, and superseded the respondents' title.

Held, also, that the Act of 1904 was intra vires of the local Legislature. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of the respondents, and affected a work and undertaking purely local within the meaning of s. 92, sub-s. 10, of the British North America Act. MCGREGOR *v.* ESQUIMALT AND NANAIMO RAILWAY COMPANY - - - **P. C. 462**

3. —— *Water—Unrecorded Waters—Water Clauses Consolidation Act*, 1897, *ss.* 2, 4—*Esquimalt Waterworks Act*, 1885, *s.* 10, *and the Extension Act*, 1892, *s.* 10—*Construction.*

By the British Columbia Water Clauses Consolidation Act, 1897, s. 4, the right to the use of all unrecorded water in any river, lake, or stream is declared, subject to a proviso in favour of existing legal rights, to be vested in the Crown in right of the province ; unrecorded water, by the interpretation clause (s. 2), includes all water not held for the time being under special grant by public or private Act.

In an action by the respondents in effect claiming to appropriate for the purpose of the municipality certain waters described as flowing from two different sources, Goldstream River and Niagara Creek, as being unrecorded water and liable to be recorded in their favour under the said Act, it appeared that the waters so claimed had under the Esquimalt Waterworks Act, 1885, and its Extension Act, 1892, vested in the appellants by force of s. 10 of the former Act, subject to the perpetual and onerous obligation imposed by s. 10 of the Extension Act of supplying water to the respondents if required after notice and in large quantity ; that considerable outlay had been incurred by the appellants in storing and conveying the waters in suit with a view to meeting such obligation ; and that without the waters in suit they would be unable to meet it :—

Held, (1.) that the appellants' Acts of 1885 and 1892 are private Acts, in the sense that they confer special rights and impose special obligations upon them for special purposes.

(2.) That the Act of 1897 did not apply to the appellants. It was a subsequent general

PRIVY COUNCIL APPEALS — BRITISH COLUMBIA—*continued.*

statute, and could not be intended to interfere with rights granted by special legislation to an extent which prevented the fulfilment of the statutory obligations imposed thereby.

(3.) That under the true construction of s. 2 of the Act of 1897 the waters in suit, having been granted to the appellants by special legislation, were not unrecorded within its meaning; and that the plain intention of the proviso to s. 4 was to preserve any right of diversion or appropriation existing under any Act already passed. ESQUIMALT WATERWORKS COMPANY *v.* CITY OF VICTORIA CORPORATION **P. C. 499**

4. —— **BRITISH GUIANA** — *Nuisance, Liability for—Grant of Statutory Powers—Construction.*

The appellants acquired on the same day, and for the same local area, exclusive power under a lighting order to supply electrical energy for all purposes, public and private, and use the same for the purpose of any undertaking: and also under a tramways licence to generate and supply electrical energy as a motive power for tramways which they were required to make and operate, and for the lighting of their cars and offices.

The lighting order imposed as a condition that the appellants should be liable for any nuisance caused by them. The licence did not repeat this condition, and required as well as authorized the appellants to execute their works, anything in any ordinance of the Colony notwithstanding:—

Held that, the appellants having accepted the lighting order as applying to the production of electricity for every purpose, the obligation not to create a nuisance imposed by that order applied to the tramways licence, which only repeated for a limited purpose the same authority as had been granted by the order. DEMERARA ELECTRIC COMPANY *v.* WHITE - - **P. C. 330**

5. —— **CANADA** — *Admiralty — Canadian Supreme and Exchequer Courts Act*, 1875, *s.* 47 *—Colonial Courts of Admiralty Act*, 1890, *s.* 6*—Judgment of Supreme Court exercising Admiralty Jurisdiction—Special Leave to Appeal unnecessary.*

Notwithstanding the provisions of the Canadian Supreme and Exchequer Courts Act, 1875, s. 47, with respect to the finality of the judgments of the Supreme Court, an appeal lies as of right under s. 6 of the Colonial Courts of Admiralty Act, 1890, from a judgment of the said Court when pronounced in an appeal thereto from a decree of the Colonial Court of Admiralty constituted in pursuance of and exercising jurisdiction under the said Act. RICHELIEU AND ONTARIO NAVIGATION COMPANY (OWNERS OF SS. CANADA) *v.* OWNERS OF SS. CAPE BRETON - - - - **P. C. 112**

6. —— *Insurance, Contract of—Limitation Clause imported from Original Policy—Construction—Clause held to be unreasonable and inapplicable.*

In a contract of re-insurance which was engrafted on an ordinary printed form of fire

PRIVY COUNCIL APPEALS — CANADA — *continued.*

insurance policy, and incorporated all its terms, there was a clause which purported to prohibit an action thereon unless commenced within twelve months next after the fire:—

Held that, having regard to the true construction of the contract, which carelessly purported to include many conditions inapplicable to re-insurance, the above clause must also be regarded as inapplicable. Such a clause is reasonable in the original policy where the assured can sue immediately on incurring loss; it cannot apply where the insured is unable to sue until the direct loss is ascertained between parties over whom he has no control. HOME INSURANCE COMPANY OF NEW YORK *v.* VICTORIA-MONTREAL FIRE INSURANCE COMPANY **P. C. 59**

7. —— *Power of Dominion Parliament — Canadian Statute 4 Edw. 7, c. 31—British North America Act*, 1867, *s.* 92, *sub-s.* 13.

Held, that the Dominion Parliament is competent to enact s. 1 of Canadian statute 4 Edw. 7, c. 31, which prohibits "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

That section is intra vires the Dominion as being a law ancillary to through railway legislation, notwithstanding that it affects civil rights which, under s. 92, sub-s. 13, are the subject of provincial legislation. GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* ATTORNEY-GENERAL OF CANADA - - - **P. C. 65**

8. —— *Shipping—Collision—Canadian R. S. c. 79—Arts.* 19, 22 *and* 23 *of the Regulations of* 1897 *for Preventing Collisions—Vessels crossing so as to involve Risk of Collision—Collision off the Entrance to Harbour.*

Where two vessels were approaching each other in Canadian waters on courses which converged at a point outside a harbour where each vessel expected to pick up a pilot:—

Held that, as they were so doing on courses and at speeds which would probably bring them to that point so as to present a danger of collision when they reached it, they were vessels crossing so as to involve risk of collision within the meaning of arts. 19, 22 and 23 of the Regulations of 1897, which had been substituted for those contained in Canadian R. S. c. 79; and that consequently it was the duty, negligently disregarded, of the respondents' vessel, which had the appellants' vessels on her own starboard side, to keep out of her way, there being no special circumstances within the meaning of art. 27 to authorize a departure from that rule.

Held, also, that the appellants' vessel was not to blame under art. 21. It was not shewn that with reasonable care she ought to have taken action thereunder earlier than she did. SS. ALBANO *v.* ALLAN LINE STEAMSHIP COMPANY, LIMITED. UNION DAMPFSCHIFFSRHEDEREI ACTIENGESELLSCHAFT *v.* SS. PARISIAN **P. C. 193**

—— **British Columbia**—Laws of.
See Nos. 2, 3, ante.

PRIVY COUNCIL APPEALS — CANADA — *continued.*

9. —— *Nova Scotia — Canada Temperance Act*, 1888 (51 *Vict. c.* 34), *s.* 10—*Issue of Search Warrant before Prosecution—Writ of Certiorari refused—Practice as to special Leave to appeal in Criminal Cases.*

Under the Canada Temperance Act, 1888 (51 Vict. c. 34), a search warrant was issued and duly executed, and large quantities of intoxicating liquor found on the hotel and premises searched and a conviction of the appellant subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor :—

Held, that, the Supreme Court having dismissed applications for writs of certiorari to remove into the said Court the record of the said search warrant and destruction order, special leave to appeal therefrom must be refused. The decision was plainly right, having regard to s. 10 of the Act under which the warrant was issued. TOWNSEND *v.* COX **P. C. 514**

10. —— *Ontario—Railway—Sale and Purchase of Street Railway System — Exclusive Power of Purchasers to operate—Construction—Ontario Act* 55 *Vict. c.* 99.

By agreement of sale and purchase between the Toronto City Corporation and the Toronto Railway Company dated September 1, 1891, and confirmed by Ontario Act 55 Vict. c. 99, the latter acquired, not merely the material of the railway undertaking in suit, but also, as was clearly provided, the exclusive right "to operate surface street railways in the city of Toronto" in the fullest possible way within the period of the agreement :—

Held, that, on its true construction, territorial additions to the city made during the term of the agreement were not within its scope.

By clause 14 it was provided that the company might be required to lay down new lines or extend tracks and car service as approved by the city, and by clause 17 it was provided that on the company failing so to do the privilege so abandoned might be granted to any other person or company without any resulting claim to the purchaser for compensation.

Held, that under these clauses, construed so as not to derogate from the exclusive right of the company, the sole remedy in case of non-compliance was that provided by the latter clause, and that a claim for damages was not maintainable.

Held, also, that the exclusive power to operate included the right to determine the route and stopping of the different cars and their inter-relations, which was not displaced by other provisions. In particular, clause 26 gave the city power to determine the speed and service necessary on each main line. But it was included amongst sections headed "track, &c., and roadways," all referring to the physical condition of those entities, and not to the course or direction of the cars, and should not be construed as intended to derogate from the company's exclusive powers. TORONTO CORPORATION *v.* TORONTO RAILWAY COMPANY. TORONTO

PRIVY COUNCIL APPEALS — CANADA — *continued.*

RAILWAY COMPANY *v.* TORONTO CORPORATION **P. C. 315**

11. —— *Ontario—Teachers—Ontario Separate Schools Act, R. S. O., c.* 294, *s.* 36—*Construction—Qualified Teachers—Exemption from Examination.*

Held, that by the true construction of the Ontario Separate Schools Act, R. S. O., 1897, c. 294, s. 36, those members of the appellant communities who became such after the passing of the British North America Act, 1867, are not eligible for employment as teachers in the Roman Catholic Schools in the province of Ontario unless they have received certificates of qualification to teach in the public schools. The exemption from examination recognized by that section is limited to those who were members at the date of the Act of 1867. BROTHERS OF THE CHRISTIAN SCHOOLS *v.* MINISTER OF EDUCATION FOR ONTARIO AND ANOTHER - **P. C. 69**

12. —— *Quebec—Bank, Liability of Director of—Overdrafts of Customers improperly allowed by Cashier of Bank—Failure to detect Errors in audited Accounts—Alleged Negligence.*

Where the collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed and entirely independent of the directors, had irregularly and improperly allowed to certain customers :—

Held, that by the law of Quebec as by the law of England, a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts.

Dovey v. *Cory*, [1901] A. C. 477, followed. PRÉFONTAINE *v.* GRENIER - - **P. C. 101**

13. —— *Quebec—Electric Wires—Negligence in exercising Statutory Powers — Evidence — Quebec Act*, 1 *Edw.* 7, *c.* 66, *s.* 10—*Construction.*

A derrick used in putting up a house in one of the streets of Montreal was brought into contact with the overhead wires of the respondent company, with the result that a current of electricity was diverted to the street and killed the appellant's husband :—

Held, that the respondents, being authorized by Quebec Act, 1 Edw. 7, c. 66, s. 10, in the alternative to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident. DUMPHY *v.* MONTREAL LIGHT, HEAT AND POWER COMPANY - - - - **P. C. 454**

14. —— *Quebec—Fishing—Grant from the Crown—Claim of Grantee to Exclusive Right to fish from the Foreshore—Construction.*

The appellant, as grantee of the lands in suit from the French king "with all the fishing and hunting and other rights and privileges which the vendor had or might have as seignior, or along

PRIVY COUNCIL APPEALS — CANADA — *continued.*

its frontage on the seashore," claimed the exclusive right to fish salmon from the foreshore along their boundary :—

Held, that, on the true construction of the grant, the claim could not be sustained. The above clause was ineffectual to pass the exclusive use of the foreshore so far as fishing is concerned. CABOT *v.* ATTORNEY-GENERAL OF QUEBEC P. C. 511

15. —— *Quebec—Will—Alternative absolute Gifts—Construction.*

A testator gave to his widow his real estate for life, and at her death to his eldest son John for life, and thereafter to "become the absolute property" of John's eldest son, alternatively "to become the property of my son James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue; James and his son who predeceased him survived the widow :—

Held, that the gift to John's eldest son being of an absolute interest, it must, in the absence of words importing a different intention, and having regard to the context, be deemed to have been the intention of the will that the alternate gift to James should also be absolute. The gift over to the appellant in case of the death of James without male issue was defeated if either James or his son lived to take absolutely. MCCORMICK *v.* SIMPSON - - - P. C. 494

16. —— **CAPE OF GOOD HOPE**—*British Bechuanaland Concession Court—Concessions by Native Chiefs before* 1891—*Proclamations of April* 25, 1889, *and February* 1, 1893—*Power of Court to modify Concession—Minerals.*

Sect. 23 of the proclamation of February 1, 1893, establishing the British Bechuanaland Concession Court empowers that Court to modify the terms, conditions and scope of all concessions made by native chiefs prior to 1891; or to impose equitable limitations, restrictions or conditions upon their exercise.

A concession by a native chief in Bechuanaland in 1889 and 1890, applicable to all minerals whatsoever, was in effect confirmed by the said Court, subject to the restriction imposed by the proclamation of April 25, 1889, which related solely to the precious metals, and in effect destroyed the appellants' right thereto :—

Held, that this was a modification within the powers of the Court and not an extinction of the conceded rights. VILANDER CONCESSIONS SYNDICATE *v.* CAPE OF GOOD HOPE GOVERNMENT P. C. 186

17. —— *Mortgages—Law of South Africa—Insolvency Liquidation—Preferential Right to Payment—Priority as between Mortgagees depends upon Date of Advances, not of Registration.*

Upon an issue as to preferential claim to payment in a liquidation upon an insolvency, it appeared that the mortgage bond under which the appellants claimed was prior in date of execution and registration to that set up by the respondent, but that no present debt was created by the appellants' bond, and no moneys had been advanced to the insolvents thereunder prior to their incurring debts to the respondent :—

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE—*continued.*

Held, that by the Roman-Dutch law applicable to the Cape Colony preference must be determined by the date of the debts, and not of the securities, and that the respondent's actual advances, being prior to that of the appellants, were entitled to priority of payment. STANDARD BANK OF SOUTH AFRICA, LIMITED *v.* HEYDENRYCH - - - - - - - P. C. 336

18. —— **CHINA AND COREA**—*Policy of Fire Insurance—Notice required of additional Insurance — Construction — Premium of additional Insurance unpaid.*

Where there was a stipulation in a policy of fire insurance that it should become null and void if the insured omitted to give notice of any additional assurance effected on the same goods with another company without the consent of the insurers :—

Held, that the policy was not avoided by omission to give notice of an additional assurance which, on the true construction of its terms, never became effective by reason of the premium not having been paid. EQUITABLE FIRE AND ACCIDENT OFFICE, LIMITED *v.* THE CHANG WO HONG - - - - - - P. C. 96

19. —— **NATAL**—*Courts-martial—Practice—Special Leave to Appeal refused.*

There is no analogy between courts-martial, so called, administering punishments and restraining acts of repression and violence under the supervision of a military commander and the regular proceedings of Courts of justice.

Where the local Legislature has declared sentences of this kind to be lawful, the Judicial Committee has no power to inquire as to their propriety or as to the propriety of the legislation; and a petition for special leave to appeal from any such sentence must be dismissed. TILONKO *v.* ATTORNEY-GENERAL OF THE COLONY OF NATAL - - - - P. C. 93

20. —— *High Treason — Resident Alien's Duty of Allegiance—Special Leave to Appeal.*

A resident alien within British territory owes allegiance to the Crown, and if he assists invaders during the absence of State forces for strategical or other reasons he is rightly convicted of high treason. Special leave to appeal from a judgment to that effect refused. There is no sufficient authority for the doctrine that the alien's duty of allegiance ceases if an enemy makes good his military occupation of the district in which the alien resides. DE JAGER *v.* ATTORNEY-GENERAL OF NATAL - - - P. C. 326

21. —— *Practice—Special Leave to Appeal*

Special leave to appeal refused where the question raised had been settled by an Act of the Colonial Legislature. TILONKO *v.* ATTORNEY-GENERAL OF NATAL - - - P. C. 461

22. —— **NEW SOUTH WALES**—*Bankruptcy—New South Wales Bankruptcy Act*, 1898—*Administration of Bankrupt's Estate—Priority of the Crown.*

Held, that in the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1898, the Crown is entitled to

PRIVY COUNCIL APPEALS—NEW SOUTH WALES—*continued.*

preferential payment over all other creditors. NEW SOUTH WALES TAXATION COMMISSIONERS PALMER - - - - - - **P. C. 179**

23. —— *Insurance—New South Wales Life, &c., Insurance Act*, 1902, *s.* 4—*Crown not bound by the Act—Prerogative Right to Priority of Payment.*

Sect. 4 of New South Wales Life, Fire and Marine Insurance Act, 1902, purports to protect the proceeds of a life assurance policy from payment of the debts of the deceased :—

Held, that, whatever the true construction and effect of the section, the Act itself did not bind the Crown, which was entitled to be paid, and by virtue of its prerogative to be paid, in priority to all other creditors of the deceased. ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* CURATOR OF INTESTATE ESTATES - **P.C. 519**

24. —— *Land—New South Wales Lands Acquisition Act* (44 *Vict. No.* 16), *s.* 13—*Prima facie Case for Compensation—Rightful Owner unknown—Claim in respect of a possessory Title.*

Land in New South Wales having been duly resumed by the Minister of Public Instruction, it appeared that at the date of resumption the rightful owner was unknown and out of possession, but that F. C. had ten years previously entered into possession thereof as vacant land, enclosed it by substantial fencing, and thenceforth up to the date of resumption held exclusive possession thereof without notice of any adverse claim, received rents and paid rates and taxes in respect of the said land, which stood in his name in the rate books of the municipality :—

Held, that F. C. was not a mere trespasser, but had a possessory title, good at the date of resumption, against every one but the rightful owner, and in the course of becoming absolute as against him. Having been deprived of the land, he had a prima facie case for compensation within the meaning of s. 13 of the Act of 1880 (44 Vict. No. 16) which was not excluded by the circumstance that under the Public Works Act, 1900, the Minister had acquired the title of the rightful owner. PERRY *v.* CLISSOLD - **P. C. 73**

25. —— *Revenue—Income Tax—New South Wales Land and Income Tax Assessment Act*, 1895 — *Regulations thereunder — Return compulsory of Income of whatever Amount—Default Assessment conclusive unless questioned under the Act.*

Under the New South Wales Land and Income Tax Assessment Act of 1895 (59 Vict. No. 15), and the regulations made thereunder, every person in the receipt of any income of whatever amount is bound to make a return thereof to the Commissioners in the prescribed form, although after all authorized deductions it does not exceed the taxable limit of 200*l*. If he neglects to do so the Commissioners may make a default assessment, which becomes binding and conclusive unless questioned by appeal under the Act.

The High Court of Australia having ruled to a contrary effect :—

Held, on appeal therefrom, leave having been granted on special terms as to costs and subject to the default assessment being amended if so directed, that a default assessment by the Commissioners of 225*l*. should be reduced to a nominal amount, and that they should pay to the respondent his costs of this appeal as between solicitor and client. COMMISSIONERS OF TAXATION *v.* MOONEY - - - - - **P. C. 342**

26. —— *Revenue—Stamp Duties—New South Wales Stamp Duties Act*, 1898—*Probate Duties (Amendment) Act*, 1899 — *Share of deceased Partner—Business carried on in the Colony.*

The share of a deceased partner is situate where the business was carried on at the time of his death.

In re Ewing, (1881) 6 P. D. 23, approved.

Where two brothers residing in England carried on the business of graziers and sheep farmers in partnership by their agent in New South Wales :—

Held, that the interest therein of one of them at the date of his death was liable to pay the duties imposed by the New South Wales Stamp Duties Act, 1898, as amended by the Probate Duties (Amendment) Act, 1899. STAMP DUTIES COMMISSIONER *v.* SALTING - - **P. C. 449**

27. —— *Streets—Rates — Sydney Corporation Act of* 1879—*Moore Street Improvement Act*, 1890—*Construction—Owners for the Time being liable for the Rates.*

The Sydney Corporation Act of 1879 authorized the municipal council to impose rates, called a city rate, on all rateable property within the city, to be paid by the occupier, or in his default by the owner thereof for the time being.

The Moore Street Improvement Act of 1890 was passed to carry out certain improvements of Moore Street on "an equitable system," and provided that the cost thereof should be divided between the whole body of ratepayers liable to the city rate and those who were owners of property within the improvement area :—

Held, overruling the Court below, that, according to the true construction of the later Act, owners of property within the improvement area meant owners for the time being. The intention was to create a charge on their property, and not a mere personal charge on the persons who happened to be owners thereof at the date of assessment. SYDNEY MUNICIPAL COUNCIL *v.* TERRY - - - - - - **P. C. 308**

28. —— **NEW ZEALAND**—*Contract—Lessor and Lessee—Implied Obligations as to quiet Enjoyment—Common Intention—Printing Machinery and Hotel Bedrooms—Nuisance from Noise and Vibration.*

Implied obligations in a contract must be governed by the common intention of the parties.

In an action by the respondents as lessees against the appellants for an injunction and damages, it appeared that both parties had agreed to a rebuilding of the appellants' printing-house on terms that the respondents were to rent from the appellants the upper floors as additional bedrooms for their adjoining hotel, and the appellants were to have on the ground

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*

floor an engine-house and printing machinery for the prosecution of their business, both parties believing that the noise and vibration which were the cause of action would be so slight that it might be disregarded :—

Held, that in the absence of evidence that the appellants had erected the building or worked the machinery and plant improperly the action must be dismissed. Both parties contemplated that the appellants should keep on printing, and that the respondents should have reasonably quiet bedrooms, but the latter intention could not be enforced if it would frustrate the former. LYTTELTON TIMES COMPANY, LIMITED *v.* WARNERS, LIMITED **P. C. 476**

—— **NOVA SCOTIA**—Laws of.
See No. 9, ante.

—— **ONTARIO**—Laws of.
See Nos. 10, 11, ante.

—— Patents.
See under PATENT.

—— **QUEBEC**—Laws of.
See Nos. 12—15, ante.

—— **VANCOUVER**—Laws of.
See No. 2, ante.

29. —— **VICTORIA**—*Income Tax—Commonwealth of Australia Constitution Act* (63 *&* 64 *Vict. c.* 12)—*Interrenant—Power of the Victorian Legislature* (18 *&* 19 *Vict. c.* 55)—*Validity of Income Tax imposed by a State on a Commonwealth Salary—Right of Appeal from Victorian Supreme Court.*

Held, that the respondent, an officer of the Australian Commonwealth, resident in Victoria and receiving his official salary in that State, is liable to be assessed in respect thereof for income tax imposed by an Act of the Victorian Legislature.

No restriction on the power of the Victorian Legislature in favour of such officer is expressly enacted by the Commonwealth Constitution Act, nor can one be implied on any recognized principle of interpretation applicable thereto.

Held, further, that a petition by the Commonwealth for a dismissal on the ground of incompetency or an appeal from an order of the Supreme Court of Victoria upholding the assessment in question must be dismissed. The Constitution Act does not authorize the Commonwealth Parliament to take away the right of appeal to the King in Council existing in this case. WEBB *v.* OUTRIM - - - **P. C. 81**

30. —— *Victorian Electric Light and Power Act*, 1896, *ss.* 38, 39—*Electric Light and Power Act*, 1901, *s.* 3—*Construction—Powers of Undertakers to vary Rates of Charge—Appeal from Australia.*

Under the Electric Light and Power Act, 1896, the respondents supply electricity within the city of Melbourne under two different systems of charge, one at a fixed rate, the other at a rate varying with the amount consumed. The system adopted is at the choice of the

PRIVY COUNCIL APPEALS — VICTORIA — *continued.*

customer; within each system no preference is given to one customer over another :—

Held, that, by the true construction of ss. 38 and 39 of the said Act, they were authorized so to do, and were not restricted to one uniform rate for all electricity supplied by them. The preference prohibited by s. 39 is not as between customers dealing under two different systems, but only as between customers dealing under the same system.

Held, also, that s. 3 of the Electric Light and Power Act, 1901, in authorizing a specified variation in rates of charge after a judicial decision to the effect that they must in all cases be uniform, did not either expressly or impliedly declare that, except in the special instance, the judicial decision must be upheld. ATTORNEY-GENERAL FOR VICTORIA *v.* MELBOURNE CORPORATION - - - - - **P. C. 469**

PROBATE—New South Wales stamp duties—Share of deceased partner—Business carried on in the Colony - - **449**
See PRIVY COUNCIL APPEALS. 26.

PROLONGATION—Patent—Petition by assignee of patents—Inventor dead—Prolongation refused - - - - **174**
See PATENT. 2.

PUBLIC AUTHORITIES PROTECTION—Contract—Action of deceit—Fraudulent representation - - - - **351**
See CONTRACT.

QUEBEC—Laws of.
See PRIVY COUNCIL APPEALS. 12—15.

QUIET ENJOYMENT — Lessor and lessee—Printing machinery and hotel bedrooms — Nuisance from noise and vibration - - - - - **476**
See PRIVY COUNCIL APPEALS. 28.

RAILWAY — *Mines — Compensation — Coal required to be left unworked—Railways Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 20), *s.* 78.

The compensation payable by a railway company under s. 78 of the Railways Clauses Consolidation Act, 1845, in respect of such mines as they require to be left unworked is the full value of the minerals required to be left unworked, namely, what the minerals would have sold for if worked, less the cost of working them.

Decision of the Court of Appeal, *Joicey & Co.* v. *North Eastern Ry. Co.*, [1907] 1 K. B. 402, reversed, and decision of Bigham J., [1906] 1 K. B. 195, restored. EDEN *v.* NORTH EASTERN RAILWAY COMPANY - - - **H. L. (E.) 400**

2. —— *Omnibus Business — Incidental Powers—Ultra vires.*

A railway company without express power to run omnibuses ran omnibuses in a way which was in this House held as a matter of fact to be not incidental to or consequential upon their statutory powers :—

Held, that the company must be restrained from carrying on the omnibus business, and that

RAILWAY—*continued.*
the undertaking required and sanctioned by the Court of Appeal was impracticable.
Decision of the Court of Appeal, [1907] 1 Ch. 81, reversed.
Decision of Warrington J., [1906] 1 Ch. 811, restored. ATTORNEY-GENERAL (AND BIRKENHEAD CORPORATION) *v.* MERSEY RAILWAY COMPANY - - - - **H. L. (E.) 415**

—— Engine-driver—Workman killed while disobeying well-known rule of employer—Workmen's Compensation Act, 1897 **209**
See EMPLOYER AND WORKMAN. 2.

—— Ontario Act, 55 Vict. c. 99—Sale and purchase of street railway system—Exclusive power of purchasers to operate—Construction - - - **315**
See PRIVY COUNCIL APPEALS. 10.

RATES—Street—Owners for the time being liable for the rates—Law of New South Wales - - - - - - **308**
See PRIVY COUNCIL APPEALS. 27.

REDUCTION OF CAPITAL—Extinguishment of founders' shares - - - **229**
See COMPANY.

RESIDUE—Succession—Will—Residue of estate to heir entitled to succeed to entail—Lands disentailed—Intestacy - **440**
See SCOTTISH LAW. 5.

RES JUDICATA—Workmen's compensation—Weekly payment ended by arbitrator—New circumstances—Power of arbitrator to review again - - - **215**
See EMPLOYER AND WORKMAN. 1.

REVENUE—*Estate Duty—Policy of Life Insurance—Interest provided by the Deceased—Family Arrangement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*d*); *s.* 3.
A tenant for life of real estates had raised money by charges on his life estate and insurance policies on his life. By a family arrangement in 1885 between him and his son (the tenant in tail) the estates were disentailed and re-settled; the fee was mortgaged by father and son for an amount to pay off the father's debts; the policies were assigned to the son; the rents and profits of the estates were held in trust to pay the interest on the mortgage, the premiums on the policies, an annuity to the son, and the residue to the father for life, with remainder to the son in fee. On the father's death the policy moneys were paid to the son, and the Crown claimed estate duty thereon from the son under the Finance Act, 1894, s. 2, sub-s. 1 (*d*):—
Held that, in the true view of the family arrangement, the son had made an absolute purchase of the policies for valuable consideration—nay, for much more than the full value; that this was not a case of an "interest provided by the deceased, either alone or in concert with any other person" within the meaning of s. 2, sub-s. 1 (*d*); and that estate duty was not payable on the policy moneys.
Decision of the Court of Appeal, *Attorney-General* v. *Lethbridge*, [1905] 2 K. B. 323, reversed and decision of Phillimore J. restored.

REVENUE—*continued.*
SIR WROTH PERIAM CHRISTOPHER LETHBRIDGE, BARONET *v.* ATTORNEY-GENERAL **H. L. (E.) 19**

2 —— *Income Tax—Charge upon Property in excess of Annual Value—Interest on borrowed Money—Right to Deduct and Retain Income Tax—Interest "Paid out of Profits or Gains brought into Charge"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *No. IV., r.* 10—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.
The London County Council is bound to pay income tax under Sched. A upon the annual value of property occupied by the council, and cannot deduct it out of the amount of income tax which is payable in respect of their Consolidated Stock, and for which the council is bound to account to the Crown.
The decisions of Channell J., [1904] 2 K. B. 632, and of the Court of Appeal, [1905] 2 K. B. 375, reversed. ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL - - - **H. L. (E.) 131**

3. —— *Income Tax—Sewer—Vested in Local Authority — "Hereditament" — "Capable of actual Occupation" — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 60; *Sched. A., Rules, I., III.*
A sewer was made, controlled by, and vested in a local authority in pursuance of statutory powers. It was rated to the poor rate. The local authority made no profit or gain out of it. The cost of making and maintaining it was paid for by a public loan repayable by annual instalments. The moneys for the repayment were found partly by contributions levied from neighbouring district councils whose sewage went through the sewer and partly from rates; and this was the only income. Upon an assessment to income tax as to a portion of the sewer:—
Held, that the local authority was chargeable to income tax in respect of the annual value of that portion of the sewer as a hereditament capable of actual occupation under the Income Tax Act, 1842, s. 60; Sched. A, Rule I.
Decisions of Walton J., [1906] 1 K. B. 294, and of the Court of Appeal, [1907] 1 K. B. 490, affirmed. YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* BENSTED (SURVEYOR OF TAXES) - - - **H. L. (E.) 264**

—— Income tax—New South Wales Land and Income Tax Assessment Act, 1895—Default assessment conclusive unless questioned under the Act - - **342**
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—— Income tax imposed by a State on a Commonwealth salary, Validity of—Law of Victoria - - - **81**
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—— Probate duties—New South Wales Stamp Duties Act—Share of deceased partner **449**
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REVIEW—Workmen's compensation—Weekly payment ended by arbitrator—New circumstances—Power of arbitrator to review again - - - - **215**
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SCHOOLS — *Education — Non-provided —School —Salary of Teachers — Time occupied in Religious Instruction—Proportionate Reduction from Salary—Power of Local Authority to reduce —Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75)—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42)—"*Maintain.*"

A local education authority does not "maintain" a non-provided school as required by the Education Act, 1902, s. 7, sub-s. 1, if it refuses to pay what is reasonable for denominational religious instruction lawfully given during school hours.

Decision of the Court of Appeal, *Rex* v. *West Riding of Yorkshire County Council*, [1906] 2 K. B. 676, reversed and decision of King's Bench Division restored. ATTORNEY-GENERAL AND BOARD OF EDUCATION *v.* WEST RIDING OF YORKSHIRE COUNTY COUNCIL. GRENSIDE, EX PARTE - - - - - **H. L. (E.) 29**

—— Qualified teachers—Exemption from examination—Law of Ontario - - **69**
See PRIVY COUNCIL APPEALS. **11.**

SCOTTISH LAW — *Servitude — Construction — Bond to secure Amenity—Meaning of the Word "unseemly" in a Bond of Servitude.*

The pursuers, proprietors of a feu, raised an action against the defenders, the proprietors of an adjoining feu held of the same superior, to enforce building restrictions. These restrictions were contained in a bond of servitude, by which the defenders bound themselves and their successors not to erect on any part of an adjoining piece of ground "any building of an unseemly description." The pursuers alleged that the defenders were about to allow the erection of unseemly buildings within the meaning of the bond of servitude :—

Held (affirming the decision of the First Division of the Court of Session, (1906) 8 F. 1109), that a condition against the erection of buildings of "an unseemly description" was too vague and indefinite to be valid as a permanent restraint on the use of property. MURRAY *v.* DUNN - - - - - - **H. L. (Sc.) 283**

2. —— *Shops—By-law—Ultra vires—Power of Magistrates to close Shops at* 10 P.M.*—Burgh Police (Scotland) Acts*, 1892 (55 & 56 *Vict. c.* 55), *ss.* 316, 318, 380, *and* 1903 (3 *Edw.* 7, *c.* 33), *s.* 82, *sub-s.* 2.

By s. 380 of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), a penalty is imposed on the occupier of any building for the sale or consumption of provisions or refreshments who opens his premises for business before 5 o'clock in the morning or keeps them open after midnight. By s. 82, sub-s. 1, of the Burgh Police (Scotland) Act, 1903, any building used as an ice-cream shop must be registered. By s. 82, sub-s. 2, town councils of burghs in Scotland may make by-laws (subject to confirmation of the sheriff and the Secretary of Scotland : s. 318 of the Act of 1892) in regard to the hours of opening and closing of premises registered as ice-cream shops, "the hours for business not being more restricted than fifteen hours daily."

The defenders, the town council of a burgh, made a by-law by which it was illegal for such premises to be kept open except between

SCOTTISH LAW—*continued.*

7 o'clock in the morning and 10 o'clock at night :—

Held (affirming the decision of the Second Division of the Court of Session, (1905) 8 F. 564), that the by-law was not ultra vires or unreasonable. DA PRATO *v.* PARTICK (PROVOST, &C., OF) - - - - **H. L. (Sc.) 153**

3. —— *Streets—Burgh—Building Regulations—"Width," Meaning of, in respect to existing Streets — Glasgow Building Regulations Act*, 1900 (63 & 64 *Vict. c. cl.*).

Sect. 9 of the Glasgow Building Regulations Act, 1900, Part II., which has a general heading "Streets," provides for the formation by the defenders of a "register of public streets," in which are to be entered various particulars as regards all public streets then in existence, and, inter alia, the "point of commencement and termination," and the "width," and enjoins the marking of such streets, and the area thereof, on an ordnance survey map.

The First Division of the Court of Session and three other judges held that the "width" as used in the Act meant in the case of existing public streets the actual width, and, secondly, that the action of the pursuers raised while the register was in preparation and before the statutory period was exhausted was competent, but premature :—

Held, that the decision of the Court of Session, (1905) 7 F. 1020, was right, and must be affirmed. CALEDONIAN RAILWAY COMPANY *v.* GLASGOW CORPORATION - **H. L. (Sc.) 160**
See next case.

4. —— *Streets—Burgh—Fixing Width of existing Street—Glasgow Building Regulations Act*, 1900 (63 & 64 *Vict. c. cl.*).

The Glasgow Building Regulations Act, 1900, makes provision for a register of public streets in Glasgow, and by s. 20 imposes restrictions upon the erection of any building upon ground adjoining any street, and for the purpose enacts that the "width" of any public street shall be the "width" set forth in the register where such width is entered therein. And the width of any public street of which the dimensions are not set forth in the register . . . . shall be fixed by the master of works :—

Held (affirming the decision of seven judges of the Court of Session, (1905) 7 F. 1034), that the master of works was bound to fix as the width of a public street the width of the street actually existing. NISBET *v.* HAMILTON **H. L. (Sc.) 158**
See preceding case.

5. —— *Succession—Will—Residue of Estate to Heir entitled to succeed to Entail—Lands Disentailed—Intestacy.*

The testator directed his trustees to entail his Kintail estate upon a series of heirs specified in a tailzied destination clause, and gave certain beneficial interests in the residue of his estate "to the heir for the time being entitled to succeed under the said deed of entail" upon his attaining the age of twenty-four. On his attaining twenty-one the institute heir of entail took advantage of the Entail Amendment (Scotland) Act of 1848, s. 27, and before any deed of

SCOTTISH LAW—*continued.*
entail had been executed obtained from the Court an order to have the estate of Kintail conveyed to him in fee simple, and he evacuated the tailzied destination, thus destroying the entail; he afterwards died unmarried before attaining the age of twenty-four. The next of kin claimed that, in the circumstances of the entail, the residue had fallen into intestacy :—

Held (affirming the decision of the Second Division of the Court of Session, (1907) S. C. 139), that the residue did not fall into intestacy, as the will declared that the beneficial interest therein was to go to the heir for the time being under the tailzied destination, and it was not a condition of such heir succeeding to the said interest that he should be in the position of heir of entail of Kintail under a deed of entail. BARONESS WESSELENYI *v.* JAMIESON
H. L. (Sc.) 440

—— Damages—Interdict too wide—Measure of damages - - - - - - **291**
See DAMAGES.

—— Licensing Acts — Refusal to renew certificate — Absolute discretion of magistrates - - - - - - **45**
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—— Trade name — Injunction — Similarity of name - - - - - - - **430**
See TRADE NAME.

SEAMAN—Contract of service for commercial voyage—Refusal to proceed to belligerent port—Wages - - - **386**
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—— Voyage, Agreement for—End of voyage—Election by master - - - **373**
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SERVANT—Master and.
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SERVITUDE — Construction — Bond to secure amenity—Meaning of the word "unseemly" in a bond of servitude - **283**
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SETTLEMENT (POOR LAW).
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SEWER—Income tax—Vested in local authority —"Hereditament" - - - **264**
See REVENUE. 3.

SHIPPING — *Charterparty — Bill of Lading —Duty of Master to sign—Bill of Lading at variance with Charterparty—Liability of Shipowner to Holder of Bill of Lading—Indemnity by Charterer.*

A charterparty contained a clause exempting the shipowner from liability for stranding and other accidents of navigation, even when occasioned by the negligence of the master; the master to sign clean bills of lading without prejudice to the charter. In mistake, and bona fide, the master signed bills of lading presented by the charterers which did not give the shipowner the exemption given by the charterparty. Owing to the negligent navigation of the master, there was a total loss of the cargo, and the

SHIPPING—*continued.*
holders of the bills of lading recovered damages against the shipowner :—

Held, that since the contract between the shipowner and the charterers was that the shipowner was not to be liable for the master's negligence, the charterers were bound to indemnify the shipowner against the claims of the holders of the bills of lading.

Decisions of Phillimore J., [1906] 2 K. B. 792, and of the Court of Appeal, [1907] 1 K. B. 809, affirmed upon the above ground. KRUGER & CO. *v.* MOEL TRYVAN SHIP COMPANY
H. L. (E.) 272

2. —— *Collision—Demurrage of Dredger—Measure of Damages.*

A dock and harbour board were deprived of the services of a dredger owing to a collision with a steamship in fault. The dredger cost much to maintain, earned nothing, and was maintained out of the rates. In applying the principle of *The Greta Holme*, [1897] A. C. 596, to the assessment of damages payable by the owner of the steamship :—

Held, that the loss sustained included the value of the work which would have been done by the dredger if she had not been disabled, and a sum for the cost of the daily supplies requisite for the dredger when at work, but not a sum for owners' profit, since the board had not incurred the expense of hiring a dredger.

Decisions of Sir Gorell Barnes, [1906] P. 14, and of the Court of Appeal, [1906] P. 95, affirmed. MERSEY DOCKS AND HARBOUR BOARD *v.* OWNERS OF SS. MARPESSA - **H. L. (E.) 241**

3. —— *Collision—"Not under command"—"Aground"—Regulations for Preventing Collisions at Sea*, 1897, *arts.* 27, 28.

A collision occurred between the steamships *Bellanoch* and *Canning*. The *Canning* was held to be alone to blame. It being alleged that the *Bellanoch* was also to blame because she had neglected to give three short blasts, as required by art. 28 of the Collision Regulations, when going full speed astern :—

Held, that the *Bellanoch* was not to blame, because even if the circumstances had brought her within art. 28 the neglect could not have affected the action of the *Canning*.

Decision of the Court of Appeal [1907] P. 170, affirmed. OWNERS OF STEAMSHIP CANNING *v.* OWNERS OF STEAMSHIP BELLANOCH. THE BELLANOCH - - - - **H. L. (E.) 269**

—— Collision—Vessels crossing so as to involve risk of collision — Collision off the entrance to harbour - - - **193**
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4. —— *Seaman—Contract of Service for Commercial Voyage—Refusal to proceed to Belligerent Port—Carriage of Contraband—Wages—Maintenance—Damages for Wrongful Discharge—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 134, 187, 188, 189.

British seamen signed an agreement for a voyage from Cardiff to any ports within certain limits, including Hong Kong, knowing that Russia and Japan were at war, that the ship was to carry coal to Hong Kong, and that coal was

SHIPPING—*continued.*

treated by both belligerents as contraband of war. At Hong Kong the master required the men to proceed with the coal to a naval base in Japan within the limits, and on their refusal illegally procured their imprisonment and left them at Hong Kong and proceeded to Japan without paying them their wages :—

Held that, the agreement being for a peaceful commercial voyage, the men were justified in refusing to go to Japan at the risk of war capture and its consequences ; and that they were entitled to wages until the final settlement, and to the cost of maintenance for the same period under the head of damages for wrongful discharge.

Decision of the Court of Appeal, [1907] 1 K. B. 670, affirmed, Lord Atkinson dissenting as to the amount recoverable. PALACE SHIPPING COMPANY, LIMITED *v.* CAINE - **H. L. (E.) 386**

5. —— *Voyage, Agreement for—End of Voyage—Election by Master—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 114, 115.

A fireman signed an agreement for a voyage, not exceeding one year, from Cardiff to any ports within certain limits, and to end at such port as might be required by the master. The ship left Cardiff, loaded a cargo in the Black Sea, and went to Southampton, where she discharged the whole of her cargo. The fireman then claimed his discharge and his wages. The master required him to go on to Cardiff.

Held that, upon the true construction of the agreement, the voyage was the voyage of the ship, not of the cargo ; that as a matter of fact the voyage did not end at Southampton, and that the fireman was bound to go on to Cardiff.

Decision of the Court of Appeal, *The Scarsdale*, [1906] P. 103, affirmed. BOARD OF TRADE *v.* BAXTER. THE SCARSDALE - **H. L. (E.) 373**

—— Harbour dues—Limits of port of Carnarvon *See* HARBOUR. **124**

—— Practice—Admiralty—Colonial Courts of Admiralty Act—Special leave to appeal unnecessary - - - - **112**
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SHOPS—By-law — Ultra vires — Powers of magistrates to close shops at 10 P.M.
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1809.

49 Geo. 3, c. xxiv.—*Port of Carnarvon* **124**
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1828.

9 Geo. 4, c. 61, s. 1—*Alehouse* - - **420**
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1832.

2 & 3 Will. 4, c. 71, s. 3—*Prescription* - **425**
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1840.

3 & 4 Vict. c. 61, s. 1—*Beerhouse* - **420**
See LICENSING ACTS. 1.

1842.

5 & 6 Vict. c. 35, s. 60, No. IV., r. 10—*Income Tax* - - - - **131**
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1845.

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1846.

9 & 10 Vict. c. 66, ss. 1, 3—*Poor Removal* **255**
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39 & 40 Vict. c. 61, ss. 34, 35—*Divided Parishes and Poor Law* - - **255**
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1888.

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51 & 52 Vict. c. 41, ss. 32, 62—*Local Government* - - - - - - **246**
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56 & 57 Vict. c. 61, s. 1—*Public Authorities Protection* - - - - - **351**
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57 & 58 Vict. c. 30, s. 2, sub-s. 1 (*d*) ; s. 3—*Finance* - - - - - **19**
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Canadian R. S. c. 79—Arts. 19, 22 and 23 of the Regulations for Preventing Collisions - - - - - - - - **193**
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TEMPERANCE — Canada Temperance Act — Issue of search warrant before prosecution - - - - - - - **514**
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TRADE NAME — *Injunction — Similarity of Name.*

Previously to the year 1904 two brothers had carried on a small business at Kilmarnock, Scotland, under the style of R. & J. F. Dunlop, the principal business of this firm being that of selling and repairing bicycles, tricycles, and motors. In 1904 the two brothers registered a company called the Dunlop Motor Company with a capital of 500*l*. This company took over from R. & J. F. Dunlop the motor business, and the purposes of the company were the sale on commission and the repairing of motors, motor cycles, and the parts thereof, the actual business consisting principally in executing repairs and selling petrol. The pursuers, the Dunlop Pneumatic Tyre Company, of Regent Street, London, who deal in tyres, pumps, and other adjuncts of motors and other vehicles, sought an injunction to restrain the Dunlop Motor Company from carrying on its business under the name of the "Dunlop Motor Company":—

Held (affirming the decision of the Second Division of the Court of Session, (1906) 8 F. 1146), that on the evidence there was no proof that any one would be misled into thinking that the two companies were the same; and, secondly, that the pursuers had no exclusive use of the name of "Dunlop." DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* DUNLOP MOTOR COMPANY - - - **H. L. (Sc.) 430**

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WIDTH—Streets—Glasgow Building Regulations - - - - - - **158, 160**
See SCOTTISH LAW. 3, 4.

WIFE—Husband and.
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WILL — *"Born in my Lifetime" — Divesting Clause—Child en Ventre sa Mère—Construction.*

There is no fixed rule of construction which compels a Court to hold that a child was born in the lifetime of a testator because it was at that time en ventre sa mère. That peculiar rule of construction is limited to cases where that construction of the word "born" is necessary for the benefit of the unborn child, as decided by Lord Westbury L.C. in *Blasson* v. *Blasson*, (1864) 2 D. J. & S. 665.

A testator by his will devised real estate in strict settlement to his brother's first and second sons (who were alive at the date of the will) successively for life, with remainder to their first and other sons in tail, with remainder to his brother's third, fourth, and other sons successively in tail, but declared his intention to be that any third or other son born in the testator's lifetime should not take a larger interest than for life only, with remainder to his issue in tail male. The brother's third son was born three weeks after the testator's death. The first and second sons died without issue:—

Held, that the third son took an estate tail, not having been born in the testator's lifetime.

The decision of the Court of Appeal, [1906] 1 Ch. 583, reversed; and the decision of Swinfen Eady J., [1905] 2 Ch. 301, restored. VILLAR *v.* SIR WALTER GILBEY, BARONET
H. L. (E.) 139

2. —— *Words of Futurity—Gift to Grandchildren in case any Child "shall predecease me" —Child Dead at Date of Will leaving Children—Construction of Will.*

A testator by his will gave legacies to the children of one of his sons, whom he described as "my deceased son." He gave the residue of his estate in trust for all or any of his children who should be living at his death and attain twenty-one or marry, "provided that in case any one or more of my children shall predecease me leaving any child or children living at my death, then such child or children of my deceased child shall take the share which the parent would have taken if such parent were living at my decease":—

Held, that upon the true construction of this particular will the testator's meaning was clear, and that the children of the son who was dead at the date of the will were not entitled to share in the residue.

The decision of the Court of Appeal, [1906] 2 Ch. 341, reversed, and the decision of Joyce J., [1906] 1 Ch. 319, restored. GORRINGE *v.* MAHLSTEDT - - - - **H. L. (E.) 225**

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